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ABSTRACT

Development and implementation of the Federal 504 Handicapped Access Regulations of the Rehabilitation Act of 1973 and the relationship between the government and higher education institutions are considered. The legislative history and overview of the regulations, institutional responses to the regulations, problems experienced by institutions with the regulations, and compliance and enforcement are discussed. The regulations are designed to eliminate attitudinal, procedural, and physical barriers confronting handicapped individuals. Field trips and interviews were undertaken with eight institutions, representing the public and private sectors, large and small schools, and urban and rural areas. Information about characteristics of the eight institutions, which are not identified, are included. The cost of compliance, and particularly of structural modifications, was the dominant concern for most institutions. Problem areas for institutions included: technical aspects of the regulations, problems of administration, and problems that relate to providing access. Views of handicapped students, an overview of institutional benefits and burdens from the regulations, and a list of some problem solutions are included. Compliance oversight is through written complaints from either individuals or groups to the Office of Civil Rights. Appendices include questionnaires used in institutional and government interviews and compliance deadlines for the regulations. (SW)

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Working Paper

THE FEDERAL 504 HANDICAPPED ACCESS REGULATIONS: A CASE STUDY IN GOVERNMENT-HIGHER EDUCATION RELATIONS

by

Cornelia W. Bailey

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PREFACE

This is the story of the implementation of a federal civil rights law that is having a substantial impact on all of higher education. It is an unfinished story without heroes or villains. On the whole, it is an encouraging story. It tells of genuine attempts on the part of the federal government, handicapped consumer groups, and colleges and universities and their Washington-based associations to work past misunderstandings and role myopias towards the accomplishment of an important evolving social purpose.

In the larger context of government regulation of higher education, insuring access for the handicapped to American colleges and universities appeared as a regulatory mandate after a decade of bickering on other issues. Both sides had learned from this frequently sullen and unproductive interface. The significance of the Section 504 handicapped-access civil rights regulations is that they have engendered a series of creative breakthroughs in government-higher education relationships that build upon past experience and that may have set useful attitudinal and procedural benchmarks for the future.

Such claims, of course, must not be overstated. The road to date has not been free of bumps. Consideration of some of the toughest issues of cost, policy interpretation, and the proper balance between institutional autonomy and the demands of social justice has hardly begun. But for persons concerned with Government and Higher Education, the following case study has more positive than negative aspects, by far.

Eight institutions were selected for study; a brief description of each is given in Appendix B. Large and small institutions were included. Some are public, some private, some urban, some rural. Five had had pre-504 experience with handicapped students and employees. Anonymity was promised to each. Generalizations and facts found in the following study are based on both direct and indirect knowledge of other institutions beyond the eight specifically analyzed for this study.

Field trips were made to seven institutions; the smallest college was covered by phone interview. In two of the smaller colleges -- ones with no previous experience with the handicapped -- only one person, the official 504 Compliance Officer, was interviewed. In the other six institutions visited, information was obtained from seven to sixteen people in the following types of positions: President, Vice President for Administration or Business, Counsel, Director of Admissions, Vice President or Dean for Student Affairs, Architectural Planner or Director of Physical Plant, Provost or Dean of Faculty, Personnel Officer, and handicapped students and employees where available.

In addition, ten federal government administrators were interviewed: one an OCR (Office of Civil Rights) regional office compliance official and the others in the Washington offices of OCR, BEH (Bureau of Education for the Handicapped), RSA (Rehabilitation Services Administration), Office of Education, and the Veterans Administration. Four members or former members of appropriate Congressional staffs added insights, as did five higher education association representatives, two officials of associations of the physically handicapped, and one state Commissioner of Vocational Rehabilitation.

The interview outlines utilized for institutional and for most government interviews are given in Appendices C and D. I have tried to be systematic in the use of interview outlines without forcing material into a set mold.

My gratitude is extended to all those on campuses, in associations and in government agencies who have given me time, information and insights, especially Alfred De Graff, Administrator of the Disabled Student Services Office, Boston University; James Bennett, Director of the Technical Assistance Unit, Handicapped Discrimination Branch, U.S. Office for Civil Rights; Leigh Phillips, Equal Opportunity Specialist, Office for Civil Rights, Region I, Boston; Laura Ford, Assistant Counsel, American Council on Education; Susan Fratkin, Director of Special Programs, National Association of State Universities and Land-Grant Colleges and Martha Redden of the American Association for the Advancement of Science, Coordinator of the HEATH project. I am particularly grateful to Dr. Carl Kaysen and Crystal Lloyd, Esq., of the Sloan Commission staff for their encouragement; to Irene Spero of the Commission's Washington office, for assistance with the literature search; and to Mini Chazen, Gail Pendleton, Renia Platt and Linda Yowaiski for the expert typing of the manuscript. I am indebted to Mary Lou Watkins of the Public Affairs section of the Office for Civil Rights for supplying the text of the regulations found in Appendix A. Special gratitude goes to my husband, Stephen K. Bailey, for his perspective and assistance throughout.

I. THE LEGAL AND REGULATORY SETTING

Introduction

"Today I am issuing a regulation, pursuant to Section 504 of the Rehabilitation Act of 1973, that will open a new world of equal opportunity for more than 35 million handicapped Americans -- the blind, the deaf, persons confined to wheelchairs, the mentally ill or retarded, and those with other handicaps." 1/ The speaker was Joseph A. Califano, Jr., Secretary of the U.S. Department of Health, Education and Welfare. The date was April 28, 1977 -- three and one half years after the addition of Section 504 to the Rehabilitation Act and two and one half years after the Office for Civil Rights had started the drafting of regulations.

What was the problem that led to the law and the regulation? What was the "old world" like? Historically the handicapped have been treated as outcasts, or if they were lucky, simply treated as hopeless and in need of care. In America, a country that cares about individuals, the "old world" in recent years has started to break up. It has been tested against emerging norms of human rights and has been found wanting. Section 504 and the issuance of the civil rights regulations pursuant to it have given the handicapped a new promise of both "liberty" and "the pursuit of happiness." But "promise" is the word. The rosier future must be seen in terms of direction, not of imminent reality.

How can there be a "new world" or "equal opportunity" for the handicapped when they cannot possibly do what "normal people" do? The posing of this question underscores the present legacy of the "old world" and emphasizes the biggest continuing access problem: attitudes, stereotypes, myths. There are patronizing attitudes of sympathy, of being generous toward them, of doing things for them. There are stereotypes of undifferentiation: "ALL handicapped are DIS-abled." There are myths of ineffectiveness: "no blind person can have any kind of job in the field of chemistry; no deaf person can be a good nurse." Above all, there is a pervasive sense of "we vs. they" — the most crippling of all stereotypic mind-sets.

Education has not been immune from the myths and stereotypes of the past. Traditionally the handicapped in elementary and secondary schools have been placed in Special Education classes along with the mentally impaired — with no intellectual challenge and little chance to prepare for college. Although many colleges did provide access for handicapped individuals, the vast majority did not.[2/] Disabled persons who reached toward college were faced with such barriers as admissions tests geared to applicants who can see and who have full manual dexterity. Those that have been admitted to college have encountered academic requirements that are not essential to the mastery of basic subject matter but which automatically exclude some handicapped individuals. And barriers to participation in various aspects of campus life have been common. If there has been accessible housing for wheelchair users, it might well be all in one area — a ghetto that all wheelchair users and even those with other handicaps, such as the blind or deaf, have often been required to use regardless of their need for special housing. Almost universally, those in positions of authority have decided on their own whether a handicapped person is able to participate or has any hope of measuring up to standards. Rarely have handicapped individuals themselves been allowed to take the lead in determining the possible avenues to full participation in academic life — an essential aspect of equal opportunity and equal treatment.

There are, of course, physical as well as attitudinal and procedural barriers confronting handicapped individuals at colleges and universities.

The following list, though not definitive and not drawn from regulations will give the able-bodied some idea of physical barriers. The most extensive physical access problems stem from the accommodation needs of individuals in wheelchairs. Access *to* campus buildings involves curb cuts (texturized for the blind), along routes that are not so circuitous that the handicapped student risks tardiness to class; accessible parking spaces as close as possible to essential buildings, twice the width of regular spaces; grade-level entrances, ramps, or outside lifts or elevators; doors wide enough for a motorized wheelchair and with minimal pull or push pressure. Access *within* a building involves proper width and pressure of doors; elimination or warning of hazards to the blind; at least one wheelchair-accessible bathroom for each sex at or near an accessible entrance; lowered phones and accessible drinking fountains; and perhaps elevators, lifts or ramps, with some means for the wheelchair users to reach call-buttons and controls and for the blind to identify floors. Science, art and computer labs present equipment-access problems that must at least be thought out in advance of a handicapped student's actual needs. One of the few physical access problems of the deaf that must be planned for, though not necessarily accomplished, in advance is an effective fire-alarm system.

There are those who ask why enormous access expenditures should be made for such a small number of people. In some particular instances this can be a valid and a crucial question. But where civil rights are concerned, it is the right, not numbers that matter. And are the numbers so small? It is difficult to find authoritative figures for the number of handicapped persons in the United States, or to estimate the number who might be expected to go to college if access were really equal. Secretary Califano's figure of 35 million probably refers to the total number in the population who fall under the Act's definition. That is about 16 percent of the population, which is not out of line with the proportion of Blacks. For our purposes a more meaningful figure is that 12 million persons ages 17 to 44 have handicaps involving mobility, vision, speech or hearing.[3]

Legislative History

Although the final regulations consumed twenty-six pages of the Federal Register on May 4, 1977, the source of the mandate -- Section 504 of the Rehabilitation Act of 1973 as amended in 1974 -- is only one sentence long:

> No otherwise qualified handicapped individual in the United States, as defined in Section 7(6), shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[4]

In 1974 the definition of handicapped person was amended to add:

> For the purposes of Titles IV and V of this Act, such term means any person who (A) has a physical or mental impairment which substantially limits one or more (of such person's) major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment.[5]

Comparison of the law's brevity and the regulations' length[6] leads to the question of whether in writing the regulations, the Office for Civil Rights (OCR) overstepped the Congressional mandate. This is the story of the mandate.

During 1973 the staff assistants to the Senate Subcommittee on the Handicapped and the House Select Education Subcommittee working under the direction of the subcommittee members, prepared for the renewal of the Vocational Rehabilitation Act. Months of study led the assistants to suggest drastic revision of the Act and the inclusion of a totally new philosophy: a civil rights approach to the access problems of the disabled. Two of the assistants were the catalysts in this process. and the fact that several of the committee members and the assistants had personal acquaintance with handicapped individuals added insights to the deliberations of members and staff. There had been past pressures for handicapped civil rights legislation from a few organizations of the handicapped, and Senator Humphrey and Congressman Vanik had periodically introduced bills to include the handicapped in the Civil Rights Act. However seminal these efforts might have been, the final decision in 1973 was to avoid opening up the Civil Rights Act for fear it would be emasculated.

As for the Vocational Rehabilitation Act, the General Accounting Office (GAO) had just released a report highly critical of much of the administration of the Act's programs -- criticisms echoed by the handicapped themselves. What is now the federal Rehabilitation Services Administration (RSA) administers the Act and grants funds to state rehabilitation agencies (DVR's, for short) for provision or funding of rehabilitation services. Then, as now, the Act's primary emphases were employment and independent living, but in too many states prior to the 1973 amendments, only those mildly handicapped and easily rehabilitated were served. As administered the Rehabilitation Act failed to serve the increasing number of severely disabled kept alive through advances in medical technology and potentially able to reenter the mainstream of society. And state DVR counselors, in granting educational funds to college-bound handicapped individuals, could control what courses those individuals took. Then, as now, educational funds are granted for study related to a vocational objective and grants are seldom given for graduate work. Before the 1973 amendments the DVR counselors could veto a handicapped applicant's choice of courses.

After all these factors were taken into account, the Senate Subcommittee directed the staff to draw up fundamental revisions to the Act and to add the civil rights approach to it. The resulting 1973 amendments required the state DVR's to give priority to serving the severely disabled, regardless of the difficulty of employment placement. The amendments also gave handicapped applicants for educational funds the deciding voice in choice of college courses.

Title V, added to the Act in 1973, contains other provisions besides Section 504. Briefly, Section 501 mandated nondiscrimination for the handicapped in government employment; Section 502 established the Architectural and Transportation Barriers Compliance Board to assure compliance with the 1968 law requiring access for the handicapped in any construction or reconstruction receiving federal financial assistance; Section 503 mandated that those with federal contracts or subcontracts over $2,500 take affirmative action to hire the handicapped. And, to repeat, Section 504 prohibited discrimination against any qualified handicapped individual in programs or activities receiving federal financial assistance. The addition of this single 504 sentence to the Act put the emphasis on prohibiting discrimination against all handicapped individuals, rather than treatment of and services for some. It is significant that the 1973 amendments dropped the word "Vocational" from the title of the Rehabilitation Act.

In composing Section 504 the staff assistants copied closely the language of Section 601, Title VI, of the Civil Rights Act. This wording, is, of course, also the language of Title IX of the Higher Education Amendments of 1972 regarding nondiscrimination against women in educational programs.

There were no explanatory clauses accompanying Section 504 as there were with Title VI — no guidance on specific issues, no mandate for regulations, and no enforcement guidelines. The statement is often made that there were no hearings, no floor debate and no opposition to the addition of Title V to the Act. This assertion makes the question of congressional mandate more acute. Actually, according to one of the key congressional staff assistants, the relevant discussion and the resultant mandate are found in the floor debates on Humphrey's bill to amend the Civil Rights Act. This bill was considered by the Senate Subcommittee on the Handicapped at the same time as the Rehabilitation Act. Most historians of 504, when searching for indications of Congressional reasoning and intent, are referred to the Senate Report accompanying the 1974 amendments to the Rehabilitation Act. The Senate Report clearly sets forth Section 504 as an aggressive piece of civil rights legislation:

> Section 504 was patterned after, and is almost identical to, the anti-discrimination language of (Title VI and IX). The Section therefore constitutes the establishment of a broad government policy that programs receiving federal financial assistance shall be operated without discrimination on the basis of handicap. It does not specifically require the issuance of regulations or expressly provide for enforcement procedures, but it is clearly mandatory in form, and such regulations and enforcement are intended.[7]

The Senate Report further states that in 1973 Congress intended that 504 should be enforced in the same manner as Titles VI and IX, with fund termination as the final sanction, and that HEW, "'because of that Department's experience in dealing with handicapped persons and with the elimination of discrimination in other areas, should assume responsibility for coordinating the Section 504 enforcement effort.'" [8]

When the question is asked of anyone connected with the history of 504 as to whether they had at that time any idea of its technical ramifications, the answer is invariably, "No; not the slightest."

In November 1978, President Carter signed the 1978 amendments to the Rehabilitation Act, extending the Act for four years. The amendments are cited as the "Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments of 1978," PL 95-602. The provisions that affect higher education will be discussed under separate subject matter headings, principally technical assistance, auxiliary aids, employment problems, problems of overlapping jurisdictions, costs of compliance, and compliance and enforcement. In broad-brush strokes, the amendments authorize $1 billion for Fiscal Year 1979; expand the jurisdiction of the Architectural and Transportation Barriers Compliance Board; allocate additional money for expansion of state rehabilitation agency programs; establish an Interagency Coordinating Council, a National Institute of Handicapped Research, and a National Council on the Handicapped; and authorize additional rehabilitation projects and services, including expansion of reader services for the blind and interpreter services for the deaf. Two new titles are added to the Act: Title VI for employment projects and Title VII for programs, including independent living, to benefit those with severe disabilities or developmental disabilities.9/

From Law to Regulations

Turning back to 1973, within HEW the task of writing and enforcing the 504 regulations was, quite logically, given to OCR.

After an act is passed, legislative history and intent are transmitted to the implementing agency by various kinds of interactions among subcommittee members, subcommittee staff and agency personnel. There was constant give and take among these three groups during the writing of the 504 regulations, and at every point the regulations drafters were assured that they had a free hand to implement the broad mandate.

One of the first tasks of the 504 regulations writers in OCR was to learn what constitutes discrimination against the handicapped. It soon became apparent that treating the subject group in the same manner as all others is not always the cure for discrimination. This technique is useful where women and minorities are concerned, but in many instances identical treatment of the handicapped — in admissions testing, for example, can be the *cause* of discrimination. To learn the nature of discrimination against the handicapped and to get ideas on how to regulate against it, the OCR drafters had frequent consultations with handicapped persons and especially with two organizations, National Federation of the Blind (NFB) and the newly formed, activist American Coalition of Citizens with Disabilities (the Coalition). There was only a moderate amount of consultation with recipients of federal assistance including higher education. However, one of the experienced institutions studied in this report received a two-week visit from OCR. There are indications that during the early stages of drafting, the government's viewpoint, backed by at least one lower court decision, was that the fox ought not to be given too much say in writing regulations concerning chickens. In the Spring of 1977, pursuant to Secretary Mathews' policy of giving the concerned public more input into regulations that concerned them, OCR held several meetings with a half dozen higher education representatives, principally Washington association personnel. Mathews' policy also led to the publication of two, rather than the usual one preliminary regulation. Comments were, of course, solicited each time. The first publication, the Draft Regulations and Notice of Intent, in addition set forth a dozen unresolved issues for comment. The other vehicle for reaction to the forthcoming regulations was a series of thirty-two public hearings, some regional, some in Washington.

The Washington-based higher education associations supplied the predominant and most visible higher-education participation in refining the preliminary regulations. As is customary, the American Council on Education led and coordinated these efforts. Starting with the publication of the Draft Regulations in May of 1976, ACE's general counsel, Sheldon Steinbach, led meetings of the inter-association Task Force on Affirmative Action to compare notes, divide responsibilities and discuss issues. An OCR representative -- one of the writers of the regulations -- attended the first such meeting. Relations were very cordial, the representative answered questions, calmed fears, and assured the group of OCR's need for "hard answers" from higher education on some of the tough issues. Both sides indicated a desire for continued cooperation. Contacts between association personnel and various OCR 504 experts increased and were cordial throughout. During one of the inter-association Task Force meetings a representative of one of the smaller associations suggested the need for an inter-association technical assistance project to use the expertise of those institutions with handicapped students and employees to assist the inexperienced institutions. A Ford Foundation planning grant helped the association in that direction. Later the effort was enlarged to become the HEATH project (Higher Education and the Handicapped), of which more later.

The higher education association replies to the preliminary drafts of the regulations showed substantial areas of agreement. Cost, especially of structural modifications, was the principal complaint, with a plea for reimbursement for what could well be a substantial burden for many institutions. Other points made were: that the regulations should be flexible; that the definition of "handicapped person" should be narrowed; that the institutions should have complete control over "academic adjustments"; that compliance by consortia or primary-facility should be allowed; that the institutions should not have financial responsibility for providing "auxiliary aids"; that assurance of compliance by a third party is sometimes impossible; and that the projected compliance deadlines were too tight.

Simple recitation of these issues gives much too bland a view of higher education's reaction to the regulations in the early stages.

Some association personnel were estimating that compliance costs would exceed the total amount of federal assistance to all of higher education. From Higher Education Daily to the Wall Street Journal, college and university officials were quoting structural modification costs "that will put us out of business." There was widespread misapprehension that campuses would have to be barrier-free, and even some statements that OCR would be able to control the curriculum.

Though the manifestations were intermittent, the Panic Period lasted from the first version of the regulations in May 1976 to late 1977. Secretary Califano and OCR Director David Tatel occasionally felt it necessary to declare that cost figures were exaggerated and were based at least in part on misreading the regulations.

Overview of the Regulations

The full text of the regulations is given in Appendix A.

This section will explain briefly the relevant provisions of the five parts of the regulations that apply to higher education. Key concepts and issue areas are underlined.

Subpart A: "General Provisions." The definitions are the most important part for this report.

"Discrimination prohibited"

> No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance.[10]

The language of this definition varies slightly from that of Section 504. "Handicapped person" is substituted for "handicapped individual," and two words are deleted: "otherwise" in "otherwise qualified" and "solely" in "solely by reason of his handicap." [11] The omission of the two words may be important despite the Regulations Analysis statement that the basic meanings are the same. In the upcoming Supreme Court case of Southeastern Community College v. Davis, part of the contention is over the proper interpretation of the law's phrases, "otherwise qualified" and "solely by reason of his handicap."

"Handicapped Person"

> any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. [12]

"Major life activities" means "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[13] Phrase (ii) is intended to protect persons who were misclassified or who have been cured of an ailment (such as cancer or heart trouble). Phrase (iii) protects persons with minor handicaps. "Specific learning disabilities," among them dyslexia, are included as impairments,[14] as are alcoholics and drug addicts. The Analysis appended to the regulations explains that "the statute and the regulation apply only to discrimination against qualified handicapped persons solely by reason of their handicap"[15] and that "a recipient may hold a drug addict or alcoholic to the same standard of performance and behavior to which it holds others..."[16]

A "qualified handicapped person" with respect to employment, is one who "with reasonable accommodation, can perform the essential functions of the job in question."[17] Accommodation is not necessary where it imposes "undue hardship." The size of the recipient's operation and the expense of a necessary accommodation are the principal determinants of "undue hardship." These standards are similar to those in the Department of Labor's (DOL) regulations under Section 503, except for the HEW addition of "essential functions." Section 503 deals with discrimination in employment and applies to those with federal contracts or subcontracts of more than $2,500. There is a possibility that at least for employment purposes, a conflict could exist between part i of the definition of "handicapped person" and parts ii and iii. See the section on Policy Interpretations for a discussion of the question.

A "qualified handicapped person" with respect to post-secondary education is one who "meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity.[18] The term "technical standards" "refers to all nonacademic admissions criteria that are essential to participation in the program in question."[19]

"*Recipient*" of federal financial assistance includes, according to established OCR policy, colleges and universities any of whose students get federal financial aid.[20] The term "beneficiary of federal financial assistance" is increasingly used in Washington circles as being more descriptive.

"*Federal financial assistance*" includes "any grant, loan, (or) contract," and "funds," "services," or "property." [21]

Under Section 84.4 ("*Discrimination prohibited*") is found the critical prohibition against "different or separate aid, benefits or services" unless they are necessary to provide aid, benefits or services that are "*as effective*" as those provided to others.[22] The section explains that it is not equal results that are mandated but "*equal opportunity*" and that this must be given "*in the most integrated setting appropriate to the person's needs*." [23]

Subpart B: "Employment Practices." Pre-employment inquiries as to an applicant's handicaps may not be made, unless the recipient is taking affirmative action under Section 503, or voluntarily under 504, to overcome "limited participation" of the handicapped, or is taking "remedial action" because of past discrimination.[24] Questions may be asked, however, about an applicant's "*ability to perform job-related functions*."[25] Tests and criteria for employment are to reflect the abilities, not the disabilities, of the individual for the job in question. And as indicated earlier, a recipient of federal financial assistance shall "*make reasonable accommodation* to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee *unless the recipient can demonstrate* that the accommodation would impose an *undue hardship* on the operation of its program."[26]

Subpart C: "Program Accessibility." The Supplementary Information section describes program accessibility as "*the central requirement of the regulation*."[27] This concept requires that *each program or activity "when viewed in its entirety, is readily accessible to handicapped persons*."[28] Access to each facility is not required, and structural changes are not mandated "*where other methods are effective*" in achieving program access, or as the Analysis puts it, structural changes are mandated only where there is "no other *feasible way to make the ... program accessible*."[29] The Program Accessibility section lists "reassignment of classes" as an example of "other methods" and indicates that priority should be given "to those methods that offer programs and activities to handicapped persons in *the most integrated setting appropriate*."[30] Colleges and universities may not attain program accessibility through *consortia*, unless the consortial arrangements apply to all students.[31]

When structural modifications are necessary to achieve program access, the alterations must conform, at a minimum, to ANSI standards (American National Standards Institute, ANSI A117.1-1961 (R1971)). Any new construction must conform to ANSI also and must be "readily accessible to and usable by handicapped persons."[32] Access "equivalent" to ANSI standards is acceptable.

Subpart E: "Postsecondary Education." This section forbids: limitations on the number of handicapped persons admitted; tests and criteria having a "disproportionate, adverse effect" on the handicapped unless the test or criterion "has been *validated as a predictor of success* in the education program or activity in question"[33] and unless better criteria are unavailable. Tests of all kinds -- admissions or academic, like employment criteria, are to reflect the individual's abilities, not his disabilities.

Pre-admission questions as to handicap are forbidden except when remedial action is ordered or when voluntary action is undertaken to "*overcome limited participation*" by the handicapped. [34] A post-admission inquiry may be made to ascertain any handicaps that might need accommodation. However, reply is to be voluntary and treated confidentially.

There is an omnibus statement under the section "*Treatment of Students: General*," that proscribes discrimination "under any *academic, research, occupational training, housing, health, insurance, counseling, financial aid, physical education, athletics, recreation, transportation, other extra-curricular, or other postsecondary education program or activity*."[35] It is in this section that the recipient's *responsibility for third-party compliance* is stated. The institution is to assure itself that any off-campus activities that are considered part of its education program (such as internships or practice teaching) are accessible.

Under "*Academic Adjustments*" a recipient "shall make such modifications to its academic requirements as are necessary to ensure" that the requirements do not discriminate.[36] Exceptions are allowed, however, for "academic requirements that the recipient can demonstrate are *essential to the program of instruction* ... or to any directly related licensing requirement."[37] Suggested modifications include time flexibility for course completion or for exams, substitution of other courses, or "adaptation of the manner in which specific courses are conducted."[38] Tape recorders and guide dogs are to be allowed in class. Exams are to measure achievement in the course rather than impaired sensory skills, unless such skills themselves are the subject of the test. The Analysis emphasizes that this section "*does not obligate an institution to waive course or other academic requirements*." [39]

The section on "Auxiliary Aids" has already caused a federal interagency conflict that will be addressed later. The regulations require the recipient to "ensure" that a handicapped student is not discriminated against for lack of education aids. Aids "of a personal nature" are not included. The Analysis states that "recipients can usually meet this obligation by assisting students in using existing resources for auxiliary aids such as state vocational rehabilitation agencies and private charitable organizations." HEW "anticipates" that most of the aids will be supplied this way.40/

As for "Housing," a "choice of living accommodations" should be available to the handicapped student that is "comparable, convenient, and accessible" at the same cost as to other students. And if off-campus housing is available to other students, some such provisions must be available to the handicapped.41/

In athletics, separate athletic activities may be made available for the handicapped (e.g., wheelchair basketball), but "no qualified handicapped student [may be] denied the opportunity to compete" for the regular team or activity (e.g., a blind wrestler).42/

In counseling, handicapped students are not to be "counseled toward more restrictive career objectives than are non-handicapped students with similar interests and abilities."43/

Subpart G: "Procedures" (i.e., Compliance and Enforcement). Since the Senate Report on the 1974 Amendments to the Rehabilitation Act specified that Congress intended Section 504 to be enforced in the same manner as Title VI of the Civil Rights Act, the procedural provisions for Title VI are incorporated by reference, to be effective until HEW can issue a consolidated procedure for all the civil rights articles it administers.

The required compliance tasks listed in the regulations are given in Appendix E, with due dates included.

Spreading the Word: Information, Interpretations, and Technical Assistance

As is customary, OCR mailed a copy of the new regulations to all recipients of HEW financial assistance, including to all college and university presidents. The Washington higher education associations mailed the regulations to each of their members in the various academic institutions across the country. Special Report # 77-6 of the National Association of College and University Business Officers (NACUBO) seems to have been the most widely utilized copy of the regulations.

Policy Interpretations. When regulations are stated in very general terms, the demand for official policy interpretations is bound to be frequent and heavy. This certainly has been the case with 504. John Wodatch, Chief of OCR's Handicapped Discrimination Branch, reported in January 1979 that the office was "answering thousands of telephone calls and hundreds of written inquiries on the regulations."[44/]

As requested by the American Council on Education in 1976, OCR did initiate on May 1, 1978, a Policy Reporter service in the Federal Register announcing "policy determinations" in all discrimination areas under OCR's aegis. Unfortunately the process of constructing and issuing policy interpretations has been very slow. As of January 1979, only six 504 interpretations, five applicable to higher education, had been issued. The first two of these (May 1, 1978) dealt with minor procedural matters. Interpretations number 3, 4, and 5 were issued August 14, 1978. Interpretation number 3 attempts further clarification of "program accessibility" by emphasizing two points: first, that structural modifications need not be made if the recipient's services can be made available by other means; second, that a recipient is not exempted if no known handicapped individuals reside in the recipient's geographical area. The first point is apparently intended to assure "recipients conducting modest programs," such as rural libraries, small welfare offices, etc., that options such as carrying services out to a handicapped individual are allowable.[45/] The Rudd, Iowa, library, discussed later in this section, would undoubtedly be included in this group. It is not totally clear, but the interpretation's wording suggests that after June 3, 1980 (the deadline for completing any needed structural modifications), no college, however small, would be allowed to carry out services instead of, for example, installing a ramp or an elevator. The second point, concerning lack of handicapped beneficiaries in a geographic area, applies to all recipients of HEW financial assistance.

Of interest to all higher education institutions is Interpretation number 4 concerning carrying mobility-impaired persons as a means of achieving program accessibility. "Carrying is an unacceptable method"[46/] except in two instances. First, "when program accessibility can be achieved only through structural changes," carrying will be allowed until changes are completed (deadline 6/3/80).[47/] Second, "carrying will be permitted in manifestly exceptional cases if carriers are formally instructed on the safest and least humiliating means of carrying and the service is provided in a reliable manner."[48/] The only example given of "manifestly exceptional cases" is a university's oceanographic vessel. Adaptation in this case is acknowledged by OCR to be "prohibitively expensive or unavailable."[49/]

Unfortunately, there are differences of opinion in the higher education community as to whether interpretation 4 is a strict or a lenient interpretation. At least two OCR officials state categorically that OCR's intent is to eliminate carrying. However, it may be that further elucidation is necessary. Sticky problems such as this are the subject of one of the OCR-funded HEATH technical assistance projects described later in this section.

Interpretation number 5 concerns participation of qualified handicapped students in contact sports. It states the right of such persons to participate but indicates that the recipient may require approval from the student's parents and/or doctor.

In August 1977, three months after the publication of the final regulations, HEW announced a new task force for a "comprehensive public awareness campaign" to inform assistance recipients of laws, regulations, and their responsibilities concerning the handicapped. What materialized for higher education up to November 1978 was one regional workshop and one booklet, Your Responsibilities to Disabled Persons as a School or College Administrator. During the present study the author encountered only one or two people acquainted with the booklet and the workshop. Their judgment was that, while both gave a useful overview, they did not give enough detailed guidance. Both suffered, from higher education's viewpoint, from being composed not just for colleges and universities but for other types of recipients as well.

One way to get interpretations out of executive agencies is to have a Senator or Congressman ask them a question. That is just what Congressman Grassley did in November 1977, on behalf of the public library of Rudd, Iowa (pop. 429, none handicapped). The library, like so many other institutions in the Panic Period, feared that structural modifications were compulsory -- an eventuality whose costs would put the library out of business. OCR Director David Tatel promptly replied in public that "other methods" could be used and suggested that, should the need arise, either a temporary wooden ramp could be built or the library's services could be carried out to a handicapped individual.

Another source of policy interpretations is the courts. It is too early in 504 history to get firm guidance from court decisions.

Eight 504 cases have received coverage in the national higher education press. As of January 1979, only one, Southeastern Community College v. Davis, had reached the Supreme Court.

The issues involved in these cases that concern higher education include: the definition of "handicapped person," academic and technical standards for admission; modification of academic requirements; alcoholism; emotional illness; specific learning disabilities; who pays for auxiliary aids; whether there is a private right of action under 504 (that is, the right of an aggrieved individual to bring legal action in court) and if there is, under what circumstances.

The granddaddy of 504 cases, Lloyd v. Regional Transportation Authority was brought to court after the passage of the 1973 Act but before the regulations were issued. The appeals court ruled that, given "a meaningful administrative enforcement mechanism"[50] a private right should be limited to judicial review of the administrative agency's actions in the case. The judge took this case because in the absence of regulations, there was no administrative enforcement mechanism. Judges since Lloyd have differed as to its applicability to other cases and as to whether a meaningful administrative enforcement mechanism does in truth now exist.

The Davis case deals with the definition of "handicapped person," academic and technical standards for admission, and modification of academic requirements for a hearing-disabled applicant. The Supreme Court has agreed to hear this case on the basis of four questions: can the college deny admission to its nursing program solely on the basis of a severe hearing disability that could interfere with the applicant's ability to provide safe patient care; does 504 require "preferential but modified educational opportunities for seriously handicapped who seek admission to highly skilled professional programs"[51]; does 504 imply a private right of action; if 504 implies a private right of action, must the individual first "pursue and exhaust" available HEW administrative remedies?

In three other cases (Camenisch v. University of Texas, et. al., Barnes v. Converse College, and Crawford v. University of North Carolina (West Carolina University)), deaf graduate students sought to have higher education institutions provide interpreters. In each case the district court granted a preliminary injunction ordering the institution to provide interpreter service pending final decision on the question by HEW. The reason for the injunction was to prevent "harm" to the individual prior to HEW's decision. Harm such as job loss could result from delay in completion of courses. In each of these three cases the court ruled that the complainant should first try administrative remedies before resorting to the courts. Camenisch has been taken to appeals court, and in Barnes the injunction was lifted and the case dismissed because no complaint was filed with HEW.

In the three cases just mentioned plus a fourth, Doe v. New York University, the OCR compliance backlog and the length of time it takes HEW to process complaints were procedural issues for the plaintiffs. The key discrimination issue for Doe was the refusal to readmit her to medical school after a leave of absence due to emotional problems.

Whitaker v. City University of New York (Brooklyn College) et. al. is the first widely publicized 504 case dealing with dismissal because of alcoholism. Professor Whitaker contends that alcoholism did not lead to neglect of his duties. The district court judge, in a preliminary motion ruling, stated that all appeals courts that had ruled on the question of a private right of action under 504 have ruled that such a right exists. As of January 1979, *Whitaker* was being tried in district court.

In January 1979 the federal courts were presented with another 504 issue: nondiscrimination for an individual with a specific learning disability. Mary Gott, a law student at SUNY, Buffalo, sued the university to obtain modifications of academic requirements, especially testing, because of a specific learning disability. The district court agreed with the university that she should be allowed some testing modifications but should be denied extra time for exams. Law school officials contend that Gott, having received three bachelor's and two master's degrees, is not a handicapped person under the 1973 Act.

Each of those cases will be mentioned again under the specific issues involved (Admissions Issues; Auxiliary Aids; Private Right of Action; etc.).

There are two non-504 court cases and two 503 administrative law cases that could have complications for 504. First, the Supreme Court's decision in the Bakke case can have and has had an impact on many facets of an institution's admissions policies and procedures, especially in those institutions that have far fewer places than applicants. This is discussed briefly under Admissions Issues in Part III.

The American Council on Education filed an amicus brief in November 1978, petitioning the Supreme Court to hear the case of *Board of Trustees of Keene State College et. al. v. Christine W. Sweeney*. ACE's interest here is in the establishment of a uniform standard of judicial review for faculty Title VII cases. This case, according to ACE, is the first instance in which a court has substituted its judgment for that of an academic institution in matters of faculty promotion and tenure.

In November 1978, the Department of Labor's Office of Federal Contract Compliance Programs issued an administrative complaint under Section 503, charging Northwestern University with job discrimination against a former cancer victim.[53] In another 503 case a DOL administrative law judge ruled in November 1978 that a carpenter with a spinal abnormality could rightfully be denied employment in a construction firm and that, on a broader scale, persons *regarded as* disabled are not necessarily protected by the Rehabilitation Act. To be thus protected, such persons "'also must prove that their respective impairments are likely to hurt their chances at employability generally.'"[54] The judge's ruling constitutes a recommendation to the Assistant Secretary of Labor for Employment Standards. This case illustrates the possible conflict or contradiction between parts i and iii of the definition of "handicapped person." Is a carpenter who is denied employment because of a spinal abnormality protected by part iii ("is regarded as" having an impairment) or is he excluded from protection under part i because the abnormality does not "substantially limit(s) one or more major life activity(ies)?" Part i could conceivably also conflict with part ii of the definition ("has a record of ... impairment..."). These questions are raised again in Part III of this paper under Employment Problems.

Technical Assistance. Many of the higher education 504 policy "interpretations" have been given out through the HEATH project (Higher Education and the Handicapped), the cooperative higher-education association technical assistance project coordinated through the American Council on Education and funded to date primarily by HEW as part of OCR's 504 technical assistance program. OCR advice, involvement and endorsement have been obtained in varying degrees for six of the eight HEATH subprojects. For instance, one of NACUBO's HEATH projects, Guide to the Section 504 Self-Evaluation for Colleges and Universities, bears the statement, "This document has been reviewed and approved for use by the Office of Civil Rights..." [55]

HEATH started in August 1976 with a Ford Foundation planning grant to the College and University Personnel Association. In January 1977 ACE took on coordination of the enlarged HEATH project. By October 1977 the following projects were underway: NACUBO's Guide; workshops, a hot-line and manuals on physical access by APPA (Association of Physical Plant Administrators of Universities and Colleges); workshops for administrators on program access by CUPA (College and University Personnel Association); and a survey and telephone information network on 504 by NEXUS, the former innovation information network of AAHE (American Association for Higher Education). Later AACRAO (American Association of Collegiate Registrars and Admissions Officers) joined, with a guide to recruitment and admissions procedures under 504.

Underway or under contract as of January 1979 are three more HEATH projects: identification and suggested resolution of higher education's most difficult 504 problems (NACUBO); training of 100 Technical Assistance Consultants (TAC) by CUPA; and a manual for modifying historic buildings (OCR and APPA). NACUBO's task force, composed of a variety of higher education administrators plus disabled individuals and James Bennett, 504 T/A Director for OCR, is an inventive, cost-effective feedback device for the government. Within a three month period and at a cost of only $17,000, higher education's toughest current 504 problems are being identified. What's more, the two parties usually at odds in nondiscrimination matters -- the assistance recipients and the protected class -- have already come to agreement on suggested solutions to many of these problems. The next step is forwarding the recommendations to OCR.

The HEATH projects have had the active, continuing participation of representatives of experienced institutions and handicapped consumer groups. In the early days, previous to their participation, the handicapped groups tended to perceive of HEATH as higher education's device to circumvent the regulations. HEATH's link to the disabled community has been Dr. Martha Redden, the current ACE coordinator for HEATH and Director of Project on the Handicapped in Science of AAAS (American Association for the Advancement of Science).

HEW funding for HEATH, requested by ACE, was delayed for months by a power struggle within HEW. Those opposed to funding HEATH argued that it was solely the government's business to provide technical assistance and that the government -- or rather, the speaker's particular part of HEW -- could do it more quickly, efficiently and cost-effectively. In HEW the campaign to fund HEATH was carried on principally by Robert Herman, Deputy Commissioner in OE's Bureau of Education for the Handicapped (BEH), and Martin Kaplan, then executive assistant to the Commissioner of Education, Ernest Boyer.

Herman and Kaplan took the issue up immediately to Secretary Califano's office, where it was handled by Fred Bohen, Executive Secretary to Califano. Bohen made it plain to all concerned that both the Secretary and the Commissioner of Education were in favor of funding HEATH and both considered the issue to be one of educational administration. The Commissioner and the Secretary also prevailed with the view that, contrary to opponents, the higher education community could carry through such technical assistance more quickly, cheaply and cost-effectively than could the government. Boyer also wished to support higher education in this voluntary effort to take the initiative in solving problems. And all five pro-HEATH principals considered this an excellent opportunity to show that even a huge bureaucracy could be responsible for a good idea.

Finally, in August 1977, $100,000 was granted, sole source, to ACE for HEATH projects. The vote of HEW's Sole Source Board was unanimous. Since that time roughly another $180,000 has been granted to HEATH by HEW. The initial funding came half from BEH coffers and half from OCR's. Later the Division of Training and Facilities in OE's Bureau of Higher Education, under the direction of Richard Rowe, became involved in both the activities and the funding of HEATH.

Some foundation support was also obtained for HEATH. In addition to the $10,000 Ford planning grant, $100,000 was received from the Kellogg Foundation and a smaller amount from the Exxon Education Foundation.

Several institutions, including all eight of those studied, have indicated that at least one HEATH project has been helpful: by giving "How To" information for the compliance tasks, including models for the Transition Plan, the Self Evaluation and admissions procedures; by facilitating exchange of experiences and concerns with other institutions; by supplying lists of resources; and by enabling administrators to direct their questions in person to OCR officials while, if they chose, maintaining anonymity.

A few observers credit HEATH with a "turnaround" in higher education's attitude toward the regulations. Certainly some of this praise is justified, but probably much of the "turnaround" simply reflects differences in institutional posture over time. The values of HEATH for OCR's purposes, however, have been substantial. HEATH was timely and cost-effective and it fitted in with OCR's pattern of voluntary

voluntary self-compliance; in fact OCR, BEH, and the Bureau of Higher and Continuing Education hope to duplicate it with other types of recipients, such as elementary and secondary education, and hospitals. At least one such contract has already been awarded.

Frank Bowe, Executive Director of the American Coalition of Citizens with Disabilities (the Coalition) attributes HEATH's success largely to the fact that the assistance and advice came from higher education's own people.

Another plus is that HEATH gives feedback to OCR on what compliance problems seem to be emerging. Finally, a major value is that the technical assistance is pin-pointed to higher education's own needs.

The HEATH projects were the most visible components of OCR's 504 technical assistance for higher education in the early days, and the first to be completed. But to confine the discussion to the HEATH projects would grossly misrepresent OCR's efforts and accomplishments. A Technical Assistance Unit was formed in the Handicapped Discrimination Branch, testament to OCR's new emphasis on voluntary compliance. In past years the only two parts of OCR were Compliance and Enforcement. As of November 1978, three manuals on 504 in relation to employment policies and procedures were being cleared for publication, and final draft was underway on a manual on program-access information gathering. Finished but not released was a paper on delivery of services for the handicapped in higher education. The author, Leigh Phillips, a paraplegic, is presently an Equal Opportunity Specialist with a concentration in higher education, in OCR's Region I office in Boston. Her knowledge of access problems comes from her days first as a student, then as Disabled Student Services Coordinator for Connecticut College.

Several other useful T/A projects were being considered or planned as of October 1978, among them a joint OCR-NCES survey of accessible space in higher education. The study, begun in autumn of 1978, covers 700 institutions, 140 of which will get site visits. One of the principal aims is to develop rational estimates of compliance costs for physical access. The plan is for site visitors to be trained by OCR, NCES, APPA and NACUBO. At least one scientist will be included as trainer since labs present serious access problems. The methodology that will be developed for estimating compliance costs will be invaluable to individual institutions. Also in the works is T/A training for OCR's regional personnel who will then be available for consultation and workshops.

James Bennett, Director of OCR's Handicapped Discrimination Branch T/A Unit, describes the development of long-range technical assistance projects as a "chicken-egg problem. Until we know more about institutional responses to the regs and until we get feedback from our early T/A efforts, it's difficult for us to know what higher education's needs are for long-range assistance."

The 1978 amendments to the Rehabilitation Act add another actor to the technical assistance scene. The powers of the Architectural and Transportation Barriers Compliance Board, created by Section 502 of the 1973 Act, are expanded to include communication barriers and to cover technical assistance to recipients in removing all three types of barriers. Any T/A by the Board is to be coordinated with OCR technical assistance.

Help with the regulations is also available from other groups, notably state DVR's and handicapped consumer groups. Frank Bowe, Executive Director of the Coalition, states that he has had several thousand such contacts with higher education institutions since the final regulations were published. For their part, state DVR personnel serve as consultants to colleges and participate in 504 workshops.

II. INSTITUTIONAL RESPONSES TO THE REGULATIONS

On June 6, 1977, five weeks after Secretary Califano announced the final regulations, a headline in Higher Education Daily read, "With a Whisper, Handicapped Regs Go Into Effect."[1] Although the Panic Period was not completely over, and fears, especially regarding costs, continued, the shouting had died down and institutions were starting to knuckle down to compliance tasks.

One truism about any complex organization is that institutional reactions to external forces can vary substantially both over time and as among administrators at any one time. This section of the report will discuss how various campus segments reacted, trace how they coped with required compliance tasks, and see what changes were deemed necessary.

Since only eight institutions were studied, statistical data are meaningless. However, in this section and the section on problems, some generalizations will be attempted. Perhaps at this point the reader would like to review the characteristics of the eight institutions studied. This information is given in Appendix B.

General Institutional Reactions

The initial panic period, from the May 1976 release of the Draft Regulations to late 1977, has already been mentioned. The cost of compliance, and particularly of structural modifications, was the dominant concern for most institutions.

Only one of the eight institutions, University A, was quoted nationally with a typical panic reaction based on possible costs. But, by the time that university's Transition Plan figures were added up, the same administrator, a vice president, indicated that structural modification costs would be manageable over the allowed three-year period. And this university has many old buildings not built for accessibility. A brief review of University A's reactions to the regulations will illustrate intra-institutional differences in reactions and roles.

The first public reaction to any regulation is usually from an institution's President, Vice President, or Counsel. The reaction of University A's Vice President has just been mentioned. Another public response came from the university's Assistant Counsel when he made an oral presentation at one of OCR's regional hearings on the draft regulations in 1976. He challenged the scope of the regulations since they affect parts of the university not receiving federal funds; he declared that HEW lacked the authority to demand modification of academic requirements; and he pleaded for confining the definition of "handicap" to sensory and motor disabilities. OCR's answer to the last point was that the definition of "handicap" was taken from the Rehabilitation Act. The counsel responded by stressing that "colleges and universities run a complex social system" and that emotional disorders, for example, had always been a basis for denying admission at University A.

The counsel's arguments are important and stem from a lawyer's proper role in protecting his client. Furthermore his fears reflect the valid concerns of higher education's chief executives who, in their proper role, must try to discern trends and plan in advance for all sorts of contingencies.

One unfortunate but probably inevitable result of the early, negative public pronouncements of this university was that to the other two parties in the triangular relationship (regulator, regulated, protected group), these pronouncements pegged the university as "anti-regs, anti-progress, anti-handicapped; the same old higher education plaint: 'We're for it in principle, BUT...'"

University A had had little experience with handicapped students: the usual story of providing access on an *ad hoc* basis as a particular student needed it. Nevertheless the Transition Plan tasks (concerned with needed structural modifications) proceeded smoothly, thanks to the fact that three key persons acted with both good sense and good will. The three principals were a student who had become a quadriplegic during his sophomore year, an architect in the Planning Office, and a Special Assistant to the President who had been designated as the 504 Coordinator. The student, one of the founders of the new handicapped students' organization, had been working with the architect for a year, planning not only for his own access but for any future handicapped students. The 504 Coordinator handled both the Transition Plan details and all personnel skillfully -- being precise with assignments and deadlines, encouraging debate on issues in committee, and soliciting creative responses from all campus segments. She frequently asked advice from neighboring institutions experienced with the handicapped. The result was almost universal cooperation and a degree of enthusiasm, despite long and sometimes heated debates in committee. This is a neat trick on any campus, given the "horizontal nature" of academic decision-making.

For his part, the architect was extremely sophisticated in planning for physical access, and tactful in liaison between physical-change requirements and affected university personnel including faculty. He had had experience with the state's detailed accessibility standards for public buildings (most of the university's buildings were deemed "public"), had paid close attention to his built-in expert (the newly disabled student), and had gotten "How-To" information from an APPA workshop.

The disabled student and his few confreres, among the first to alert campus officials in the Spring of 1976 to the pending 504 regulations, attempted to raise administration consciousness on the problems of the disabled. The student's patience in trying to get a commitment from the university was finally rewarded one year later by appointment of the 504 Coordinator and of a campus-wide committee to work on the Transition Plan. Both the architect and the student served on the Transition Plan committee.

This story illuminates four generalizations: there are valid intra-institutional differences in reactions, based largely on role; handicapped students are often the prime movers for access action; liaison is important between change needs and those affected by the changes; and, most obviously, a highly placed person with superb administrative skills can get cooperation and can get things done.

One further observation should be made on the shift from a negative initial institutional reaction to a more positive one. Once the 504 regulations became final, University A knuckled down to what was required. It is impossible to tell how many institutions have begun the process of compliance, and how many are sitting on their hands -- at least until the appearance of a handicapped student. Several officials in HEW agencies have indicated their feeling that higher education is complying. This view is echoed by executives of the two handicapped consumer organizations interviewed and by several observers in higher education associations. Certainly there is the possibility that many institutions are doing the bare minimum simply to keep the feds off their backs. But this does not appear to be the case in the twenty-odd institutions with which this reporter is familiar, though it is possible that the very presence of a recorder warps the research material. However, it has seemed as if willingness to comply is the rule, not the exception.

In trying to generalize about institutional reactions to the regulations, it became clear that the factor of an institution's experience with the handicapped was not a controlling one. Positive reactions were found in both experienced and inexperienced institutions. Enthusiastic application to the tasks, just chronicled for University A, was duplicated in another of the eight institutions -- a small, inexperienced college -- and credit, again, goes to excellent administration. Both these campuses illustrate the observation of one handicapped person: "If the regs are seen as a challenge rather than as a chore, the attitude will be positive."

John Phillips, President of the National Association of Independent Colleges and Universities (NAICU) and formerly U.S. Deputy Commissioner for Postsecondary Education, feels that in the private sector, institutional mission and Board and Presidential leadership are key factors in insitutional reactions to 504. Some private institutions, including small ones, have made it a point over the years to accept students not traditionally served by other colleges and universities. Oberlin College's early acceptance of blacks is one example; Roosevelt University's emphasis on the center city is another. To such institutions, Phillips believes, the acceptance of one more category -- the handicapped -- is natural.

One would think that the 504 regulations would be easy for institutions already experienced with the handicapped, but this is not necessarily so. Of the five experienced institutions, two with fairly new DSS programs and with mainstreaming procedures substantially like that of the regulations, were substantially in compliance and had positive attitudes toward the regulations. The two institutions with more than a decade of experience with handicapped students have had considerable difficulty in jibing some of their admissions procedures with the regulations. By and large, however, their attitudes toward the regulations have been positive. The fifth experienced campus, whose 504 efforts were disorganized, was split down the middle by the regulations, with bitterness on both sides and long delays in accomplishemnt of compliance chores. In this instance there were no clear lines of authority, not even agreement as to who was in charge of committees, and communications were often either non-existent or unclear. The division of opinion was largely between the handicapped community, including the Disabled Students Services Office, and the rest of the administration. Both sides, though proud of the institution's leadership in handicapped access, looked unfavorably on the regulations. The handicapped group felt that the university administration would use the regulations as an excuse to settle for only the barest minimum of compliance and that DSS's long-range plans for better access, worked out from several years' experience, would suffer. Some of the top university administrators considered the regulations just another unrealistic, political document with insufficient guidelines. This is the only instance encountered in which an experienced institution did not seem able to utilize the regulations to do what they wanted to do anyway toward improving access.

Only one of the eight institutions studied was among the twenty-three that wrote self studies for the Sloan Commission. It is worth noting that this institution took a favorable view of the 504 regulations despite their serious problems with other federal and state regulations. When asked to explain this difference in attitude, one administrator pointed to the fact that 504's reporting requirements are minimal. Furthermore, he said, these reports are free-form so that he could summarize what institutional changes were necessary and what changes had already been made in a format that was useful to the institution. Another official mentioned that 504 requirements happened to jibe well with state equal access mandates. Undoubtedly another factor was that this institution has modern buildings, most of which were already accessible.

As for the smallest of the eight institutions -- the rural college with only 500 students, it is a little difficult to judge its reaction since it was interviewed by phone. All regulations are burdensome for an institution this size, so one gets a sense of negative reaction to 504 by top administration. All government requirements in this college are the province of the one willing person out of a faculty of only two dozen (full-time). His attitude seemed positive, though obviously 504 had to stand in line until he could fit it in with his full-time teaching and departmental-chairman responsibilities. Here again, the fact that a study was being made may have colored the institution's replies.

At about this time in such a study the question arises, how does a college or university, short of government mandate, arrive at the commitment to admit handicapped students and employees and to do whatever is necessary for their full participation? In the case of the three public institutions studied, all of which had pre-504 experience with the handicapped, the answer given was that "a public institution serves the public." Of these three institutions the community college indicated that it and other community colleges have always paid special attention to the non-traditional student. As already mentioned, certain private colleges and universities, including one of the eight in this report, also have chosen to serve nontraditional groups. For these institutions, dedicated and geared to handling special problems, one additional category of student is not likely to be upsetting.

One of the three small private colleges studied has welcomed the handicapped since its founding about two decades ago. The commitment originated with five or six founding members of the Board of Trustees who had relatives with handicaps. This type of personal commitment calls to mind the reactions of members of the Senate Subcommittee on the Handicapped in 1973 when Section 504 was first being composed.

In four of the eight institutions studied, handicapped students themselves spearheaded the campaign for a permanent commitment, as opposed to ad hoc access measures.

In several states a pioneering DVR (Department of Vocational Rehabilitation) has been the prime mover or the enabler for the achievement of access for the handicapped.

The Accomplishment of Compliance Tasks

The compliance tasks required of colleges and universities include (1) appointment of a 504 Coordinator, (2) establishment of grievance procedures, (3) submission of assurance-of-compliance form, (4) attainment of program accessibility (except for needed structural modifications), (5) notification of nondiscrimination policy to employees and beneficiaries, (6) completion of a Transition Plan (for accomplishing structural modifications), (7) completion of Self Evaluation, and (8) completion (by 6/3/80) of needed structural modifications.

Of the first five tasks, only one seems to have caused any ripples. One of the higher education associations suggested that institutions consider crossing out part of the assurance-of-compliance form, on the grounds that signing that part committed the institution to obey any unseen future regulations. Some institutions did cross out, as suggested. In such cases OCR sent a second copy of the form, with a warning about noncompliance and with reasons given for the need for uniformity in forms.

The assurance-of-compliance form illustrates OCR's conscious attempt to improve over past performance. The 504 form is simple: only one page long and requiring only the name of the 504 Coordinator and a signature. This is opposed to the six-page Title VI form. Furthermore the information in the forms is computer banked. Under previous hand methods one was uncertain as to whether the University of New Hampshire was filed under "U", "N", or "H".

Only brief mention needs to be made of the other four initial compliance tasks. As for the appointment of the 504 Coordinator, in six institutions the administrator chosen was either in or near the President's office. In the other two cases, experienced DSS Directors were tapped.

Establishment of grievance procedures has not surfaced as a difficult issue. Apparently many institutions are simply folding 504 procedures and due process in with those for Title IX and other similar matters.

The fourth task, attainment of "program accessibility" short of structural modification, was to be accomplished within sixty days of the effective date of the regulations, i.e., by August 3, 1977. Apparently very little attention was paid to this provision, and its timing made no sense vis-a-vis the required one-year Self Evaluation directed to whether policies and procedures do in fact provide program access. One can hazard the guess that all deadlines, including this one, were meant to insure that there would be no delay in working toward compliance. Possibly also OCR wanted to be sure that handicapped applicants were not turned down out of hand for the upcoming school year.

Notification of nondiscrimination policy to potential and present beneficiaries (students) and employees falls in line with other such declarations, including as an add-on at the bottom of the institution's stationery: "This institution does not discriminate on the basis of race ...

... or handicap." By now many of the public institutions, required by law to have written statements of policy, have invented an add-on formula that allows them so add handicap or anything else, without the formality of Board of Trustees prior approval.

This leads finally to the two basic, time-consuming compliance chores: the Transition Plan and the Self Evaluation -- neither of them with a required format; both of them to be developed "with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons."[2] Colleges and universities have pleaded with the government for flexibility in regulations so that differences among institutions can be accounted for. The 504 regulations allow flexibility both in format and in means of achieving compliance. As far as format goes, most institutions, to this writer's knowledge, welcome the flexibility; but a few administrators have wished for more specific guidelines for these two tasks, even perhaps for alternative compliance models. The lack of official written policy interpretations does cause some difficulties for institution administrators, both in completing the two tasks and in making access decisions regarding individual handicapped persons.

Most of the eight institutions studied have relied on the HEATH projects for format models and interpretations.

Some rural institutions with no handicapped students or employees have had difficulty securing the input of handicapped persons for the Plan and the Evaluation. Such problems are not insoluable, however, and the requirement for inclusion of such persons reflects both the experience and the wisdom of those handicapped organizations that served as advisors to the writers of the regulations. It is probably impossible to determine "accessibility" without the input of handicapped persons. Witness the remark of a paraplegic professor: "The difficulty is that nonhandicapped people can't always visualize the problem. Even trained architects will plan an 'accessible' toilet stall with a wide enough door but no room for the wheelchair to turn around."

In line with the mandate to involve "interested persons," all but the smallest of the eight institutions formed a committee for the two tasks, with participation by decision-makers from all segments of campus. It was in such committees that differences in interpretation of regulations were hammered out.

The Transition Plan. This plan is to contain a list of the structural changes needed to make "the program ... viewed in its entirety ... readily accessible" to the handicapped;[3] and it is to include detailed steps plus a timetable (to 6/3/80) for such changes. The first major part of the task is to survey the physical plant with an eye to access to essentials such as to the library, to required courses, to student services. Then the pieces of the survey are to be put together and decisions made as to what structural changes are necessary to achieve program accessibility. Finally, the details and a timetable are added.

Only one of the eight institutions finished its Transition Plan on time (deadline, 12/3/77); that was the small college that was accessible from its inception. The basic reason for delays, which must have been common all across the country, was the tight deadline. Six months is too short a time, at least for recipients with many buildings, to complete such a complicated task , particularly if it is to be done well. But there are other reasons for the delay as well. In the large universities where more than one group did the survey, the Transition Plan committee spent a lot of time making sure that cost figures from the various segments were comparable. For instance, estimates for some ramps were based on a guess as to the value of the time spent by buildings and grounds personnel; in other instances no figure was given because of the impossibility of separating the cost of the ramp from the rest of B & G's work at that site on that day. This is not a minor matter; it is illustrative of the present national controversy over federal reimbursement for compliance costs. Although the cost figures are not a required part of a Transition Plan, they are nonetheless a required part of each institution's planning for structural modifications.

Lengthy, sometimes heated debate was common as committee members tried to come to agreement on what structural changes were really required under a general criterion like "program access." The regulations do not require "structural changes in existing facilities where *other methods are effective*"[4] in achieving program accessibility; one sentence even says "*any other methods*."[5] The Analysis states that structural changes are required only when "there is *no other feasible way*" to make the program accessible.[6] Is carrying a wheelchair user upstairs an acceptable alternative to installing a ramp or elevator? This was a wide open question in the summer of 1978 when this report was being written and when overdue Transition Plans were still being composed by many institutions. The first semi-authoritative answer to this question was in NACUBO's Self Evaluation Guide which was approved by OCR as in accordance with its policies. The NACUBO Guide, issued in early 1978, states flatly that carrying must be discontinued after structural modifications are complete (deadline, 6/3/80). OCR's Policy Interpretation Number 4, issued August 14, 1978 and mentioned earlier, in more equivocal language declares that after June 3, 1980, carrying will be allowed only in "manifestly exceptional cases."[7] Some knowledgeable higher education representatives in late 1978 still question how firm OCR will be about carrying.

To add to the problems of Transition Plan writers there is some indication that after June 3, 1980, standards of access may be different for different kinds or sizes of institutions. One OCR compliance official indicates that some "other methods" (his example was carrying services out of an inaccessible building to an individual student) might be allowed only for "very small institutions" with few or no handicapped students. Granted that this sort of interpretation probably falls under the heading of leeway to avoid "undue hardship" on small recipients, the lack of definitive interpretation has made Transition Plan decisions difficult.

Another reason for delay in completing Transition Plans is the difficulty, even for experienced institutions, in getting sensible and reliable cost estimates on structural modifications. And it is hard for any college or university these days to decide how to commit its scarce funds. In one experienced, mainstreaming university the 504 Coordinator refused to include in the Transition Plan the required timetable. "How can we say that we'll complete certain modifications by a certain date when we don't know where the money's coming from?" he queries; and the Vice President for Operations adds, "if elevators are involved, we're sunk." Probably most institutions simply included modifications and a timetable in the Plan with the hope of federal funding.

How, then, were decisions made as to what structural modifications were to be included in the Transition Plan? Each college or university has to decide how it can accommodate to each new government mandate. For University A, the "common sense and ingenuity" that OCR urged on recipients has enabled it to come up with cost figures it feels it can manage. For University B, an experienced institution with many small, old, inaccessible city buildings, the in-house guidelines for modification decisions are "what the 504 Coordinator proposes and we can afford." The access standards seem to be quite different in these two institutions. For instance, University A's Transition Plan includes access into all laboratory rooms, but with further accommodation to await the needs of individual handicapped students. The 504 Coordinator in University B is fine-tuning lab access on the basis of "unique lab types." A unique type would be one where the basic work could not conceivably be moved into another type of (accessible) lab.

It is obvious that in some way or other, cost is either the controlling factor or a principal factor in making Transition Plan decisions. But for an overall statement of how institutions are coping with the compliance tasks, nothing says it better than the remark of one university counsel: "We do the best we can. If we screw up, the government will land on us."

Meanwhile, what does OCR expect? "A good faith effort" is their universal reply. One compliance officer added, "We're not so much interested in whether the Transition Plan is finished as in whether a start has been made." This remark implicitly acknowledges the tightness of the Transition Plan deadline.

The Self Evaluation. The purpose of this one-shot task is for the institution to evaluate its policies and procedures, to modify any that are discriminatory, and to "take appropriate remedial steps to eliminate the effects of any discrimination that resulted"[3] from such policies and procedures.

At the time the material for this survey was being gathered, not much information was available on how the institutions were progressing and what problems they were having with the Self Evaluation. Follow-up phone calls in the summer of 1978 indicated that none of the eight met the June 3, 1978 deadline for completion of the evaluation, and that admissions policies and procedures were causing the biggest problems for the two institutions with over ten years experience. These two institutions are now in the process of deciding what of their procedures must be eliminated, what can be maintained with some alterations, and what can be retained but with changes in wording or emphasis. As for the last alternative, it is not easy to determine whether the term "rationalization" applies here in the pejorative or the non-pejorative sense.

As for completing structural modifications by June 3, 1980, this is a deadline that many institutions cannot meet. In several public institutions the deadline for submitting budget requests for 1979-80 passed before the Transition Plan could be completed. Communications to NACUBO indicate that this is one of the most common 504 complaints.

It is interesting to speculate what OCR's reaction would be if a compliance review revealed that an institution had planned some post-6/3/80 deadlines for making structural modifications. One way to save money on modifications is to work them in when other work on a particular facility is being scheduled. Would an institution be penalized if such work was scheduled for some date after June, 1980?

Changes Made and Projected

In the introduction to this report an indication was given of the types of structural modifications often necessary to provide physical access on a campus. This is a formidable list for inexperienced institutions. And even experienced institutions generally need some additional changes to achieve compliance with the 504 regulations. Of the five experienced institutions surveyed, only the small one built to be accessible felt that it had definitely achieved compliance.

It is not always easy to distinguish between the changes that the five experienced institutions deemed to be necessary for minimum compliance and those they chose to make in order to improve access even further. Once the pre-504 commitment to the handicapped had been made, the basic motivation generally seemed to be to increase access, not simply to comply with the regulations.

Whatever structural changes were included in Transition Plans, such decisions are not set in concrete, unless the ramps already are. As a Vice President in one of the inexperienced institutions said, "Our Transition Plan is a living document, subject to change as we get more experience and sophistication." Such flexibility would probably meet with OCR approval, since the regulations specify that the Plan is to be changed if necessary to jibe with whatever policy and procedural changes are found essential after the Self Evaluation is finished.

Because the eight institutions' Self Evaluations were incomplete, not many firm generalizations could be made about the types of policy and procedural changes projected. As of summer 1978, the biggest Self Evaluation problems for the two most experienced institutions seemed to be in the admissions area. These will be discussed in the section on problems.

A quick review of the Postsecondary Education part of the regulations, as set forth in an earlier part of this report, will indicate the types of issues that the Self Evaluation will deal with. Admission policies and procedures may well present problems for some inexperienced as well as experienced institutions, since pre-admission questions as to handicap are forbidden. Colleges and universities will also have to examine the mode in which admission tests are given, to make certain that applicants with handicaps are equitably tested. All academic requirements must be examined, to determine whether requirements discriminate. Thought must be given to provision of auxiliary aids, counseling, and access to extracurricular activities -- to name some of the more important areas. Changes may need to be made in employment policies. Some of the changes, for instance in admissions and employment policies, will consume more time than money. Others, such as provision of auxiliary aids, will require expenditures over time.

Only one of the eight institutions has planned a nonstructural change that demands extra continuing expense: the addition of a DSS Coordinator on one campus. Several experienced persons have indicated that this personnel change generally become necessary when the number of disabled students on a campus at any one time reaches about 100.

III. INSTITUTIONS' PROBLEMS WITH THE REGULATIONS

This study revealed over a dozen problem areas that colleges and universities have to deal with in complying with the 504 regulations. The problems are of several different types: technical aspects of the regulations, problems of administration, problems that relate as much to the provision of access as they do to the regulations themselves. Several of the problem areas come under all three of these headings. This makes it difficult to present the issues in any logical sequence.

The order in which the problems are listed is based on two factors: the order in which an inexperienced institution is likely to encounter them and the order in which the provisions of the regulations are given in Part I of this study.

To wrap up Part III there will be an indication of the handicapped students' views, an overview of institutional benefits and burdens from 504, and a list of some problem solutions.

Compliance Deadlines

Enough has already been said on this subject. Here it needs only to be made part of the list of problems.

Atttitudes and Awareness

This basic access issue, raised in the first part of the report, is especially acute for inexperienced institutions. And because of turnover in the student body and among employees, including faculty, even experienced colleges and universities find that some kind of awareness training is needed. Most commonly, literature and workshops are made available by the DSS Coordinator. Handicapped students are always willing to help out, too. The handicapped student organization in one college put out a booklet for the campus: "Everything You Always Wanted to Know About the Handicapped but Were Afraid to Ask," As indicated in the Introduction, many handicapped individuals find that the greatest barriers they face are the attitudes, stereotypes and myths to which they are subjected by those with less visible handicaps.

Definition of "Handicapped Person" and "Qualified Handicapped Person"

The inclusion of any categories outside of the traditional physical handicaps (of mobility, sight, hearing or speech) causes special problems for colleges and universities. "Mental impairment," "specific learning disabilities" and "alcoholics and drug addicts" are probably the most troublesome.

The inclusion of *alcoholics and drug addicts* does not seem as much of an issue in regard to employment as it does in regard to students. Employment issues will be mentioned under a separate subhead. As far as student admissions are concerned, the inclusion of addicts and alcoholics is bound to be a touchy subject, especially in view of the delicate balance of factors involved in admissions decisions. Or, to repeat what University A's assistant counsel said at a hearing on the Draft Regulations, "Colleges and universities run a complex social system." The same statement applies to student conduct after admission. The regulations' Analysis acknowledges that "application of section 504 to active alcoholics and drug addicts presents sensitive and difficult questions ..."[1] Almost a half page of the *Federal Register* is then devoted to explaining that "a recipient may hold a drug addict or alcoholic to the same standard of performance and behavior to which it holds others ...,"[2] and that "behavioral manifestations of the condition may be taken into account"[3] in deciding whether an alcoholic or addicted student is qualified. Ability to participate in the program and the individual's effect on others and on the program are valid considerations.

Some religiously based colleges and universities outlaw drugs and alcohol altogether. OCR has received appeals for clarification of 504 responsibilities from several such institutions. The answer, found in the Analysis, is that the 504 regulations do not prohibit disciplinary rules or their application "provided that the rules are enforced evenly with respect to all students."[4]

Students with *specific learning disabilities* pose problems both before and after admission. The admissions problems will be discussed later. Once such a student is admitted, accommodations may well have to be made. The option of time flexibility for finishing course work may be the only adjustment a dyslexic might need. However, issues of equity could arise: does the professor then grant more time to the student who is merely slow? Equity problems related to student requests for extra time are not new to professors. It is hard to say whether the legal protection of the Rehabilitation Act will make a professor's decisions more difficult for the handicapped student than for the other students. One dyslexic's request for academic accommodations has resulted in a court case, *Gott v. State University of New York, Buffalo*, to be discussed shortly.

Higher education institutions certainly are not required to admit *mentally deficient* students. The regulations protect academic standards by defining a qualified handicapped applicant as one "who meets the academic and technical standards requisite to admission or participation ..."[5] But mentally deficient job applicants are to be considered in a non-discriminatory manner for jobs for which they are qualified. Custodial or kitchen work are examples of such jobs.

Individuals with *emotional or mental illness*[6] are in the protected class. It is very common, however, for mental or emotional disturbance to be grounds for denial of admission to college or for suspension or dismissal of a student. It is too early to tell how easy or difficult it will be to reconcile these two points of view, but reference to the Analysis guidance on alcoholics and drug addicts could be helpful. Thus the ailment per se cannot be grounds for exclusion of the individual, but the "behavioral manifestations" of the ailment may be.

There was a 1978 federal district court case, *Doe v. New York University*, in which discrimination on the basis of emotional illness is alleged. The case will be mentioned again, since it involves admissions problems and private right of action.

In November 1978 the American Council on Education and 27 states attorneys general petitioned the U.S. Supreme Court to hear a case involving, among other things, the definition or interpretation of "*qualified handicapped person*." The Supreme Court has agreed to hear the case. The regulations define a qualified handicapped person for higher education purposes as one who "meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity."[7] Since the case, *Southeastern Community College v. Davis*, concerns the application of a hearing-impaired person for nursing school, it will be discussed further in the section on admissions issues.

Gott v. State University of New York, Buffalo is another case that involves, in part, the question of who falls under the 1973 Act's definition of "handicapped." Mary Gott, a law student, petitioned SUNY for academic modifications, especially for tests, because of a specific learning disability. In January 1979, the district court sided with the university in granting her request to take exams in a quiet room with an English dictionary but denying her request for extra time on tests. The law school claimed that Gott, who had received three bachelor's and two master's degrees, was not "handicapped" under the Act.

Two Department of Labor administrative law cases under section 503 indicate that problems with the definition of "handicapped person" are cropping up in the employment area as well. For a discussion see Part I, Policy Interpretations, and Part III, Employment Problems.

Need for Interpretation of Regulations

The need for interpretation crops up throughout the study, and the flexibility and vague standards of the regulations are a major cause. Some institutions had initial doubts about their ability to make 504 policy without more specific guidance. The T/A available through HEATH and directly from OCR, has resolved many doubts and helped institutions "get the hang" of planning access on a flexible basis. The term "program accessibility" and the key phrases connected with it were discussed in the section on Transition Plans. Interpretation of phrases like "other methods" of providing program accessibility, "effective methods", "any other methods", "no other feasible way" to achieve program accessibility, "most integrated setting appropriate" and "program viewed in its entirety" -- interpretation of these phrases is essential in deciding what structural modifications are required. The fact that oral OCR interpretations on these points differ and the indications that not all "other feasible" ways to provide access may be acceptable, cause difficulties and possibly also inequities.

There is a bevy of interpretation issues centering around the definition and standards of physical access. The first such problem is the ANSI (American National Standards Institute) standards which the regulations cite as the minimum access standard. They are too brief; critics say that in some cases they are also too specific, in others, too vague. For more than two years they have been in the process of revision. Meanwhile, fortunately, a few excellent substitute guides are available, including two on architectural accessibility for campuses. Presumably OCR would deem the access standards in such guides to be "equivalent" to ANSI's.

OCR has repeatedly urged ingenuity and common sense in finding "other methods" of program access besides structural modification. This should enable many institutions to achieve accessibility without overwhelming expense. Ironically, two suggestions for "other methods" that have received oral approval from an OCR official are not "effective methods" for some handicapped individuals. For instance, the use of dixie cups as a substitute for lowered drinking fountains, and the use of sticks to reach elevators controls -- these two methods cannot be handled by all quadriplegics. They are, however, effective for paraplegics and certainly are much less costly than structural modification.

It is worth repeating that lack of detailed guidelines is an inevitable corollary to regulatory flexibility. The almost universal reaction encountered in this study was gratitude for the flexibility, but there was also some impatience at the difficulty of getting official interpretation of the regulations' general criteria. NACUBO's current effort to identify persistent problems and suggest consensus solutions should speed the output of official policy pronouncements.

Admissions Issues

This is one of the primary areas of contention between OCR and higher education. Some of the issues stem from the definition of "handicapped person" and "qualified handicapped person" and were mentioned briefly in a previous section. Other areas of concern, especially for some of the most experienced institutions, are: limitations on the number of handicapped admissions; required admissions procedures; and pre-admissions questions on handicap. Some of the most serious issues concern admissions criteria such as "technical standards."

Specific learning disabilities. Just one illustration will be given of the admissions problems posed by inclusion of specific learning disabilities within the definition of "handicapped person." With winter and spring of 1978 came the first admissions season since the promulgation of the 504 regulations. Two of the institutions under study had complaints at that time from dyslexics who were denied admission. In each case the applicant, after admission was denied, admitted that he was dyslexic and demanded reconsideration on the grounds that his learning disability kept him from finishing the admissions test well and on time. This is bound to be a thorny issue for institutions and OCR alike. One of the problems will be whether time leeway can justifiably be allowed for dyslexics in either admissions or academic tests but denied to others who are simply slow thinkers or slow writers. The case of Gott v. State University of New York, Buffalo illustrates differences of opinion as to whether a learning-disabled person falls under the protection of the Rehabilitation Act. See the section on Problems with Definition.

Emotional or mental illness. There is a brief treatment of this issue in the section on problems connected with the definition of handicapped person. The federal district court case of Doe v. New York University arose from NYU Medical School's denial of re-admission to a student who had taken leave of absence because of emotional problems. No ruling was made by the district court on the discrimination issue because the judge insisted that Doe first exhaust HEW administrative complaint mechanisms before bringing suit.

Testing. Admissions tests and criteria having a "disproportionate adverse effect" on the handicapped are prohibited unless validated "as a predictor of success in the education program or activity in question,"[8/] and unless better criteria are unavailable. Later in this text two illustrations are given of institutional admissions criteria that are defended as being predictors of success. One example, given under "Required Admissions Procedures," concerns a small college. The other example, given under "Technical Standards," comes from a school of veterinary medicine.

The regulations also require that tests reflect the individual's aptitudes, not his disabilities. The art of modified testing, however, is pretty primitive. Reliable means have not yet been developed, for instance, to measure accurately the abilities of those with learning disabilities or with mental problems. And there are problems in trying to equate results when tests are given under altered conditions as is done for blind or deaf applicants. OCR and the two biggest college-entrance testing organizations, ETS and ACT (Educational Testing Service and American College Testing), are working on these issues.

There are three prohibitions in the admissions section of the regulations that are causing headaches for some of the most experienced institutions, including two of the eight studied. The prohibitions outlaw: (1) limitations on the number of handicapped students, (2) special procedures required of some handicapped applicants as a condition of admission, and (3) pre-admission questions on handicap. During the summer of 1978 the biggest 504 problem for the two institutions in question was the internal agonizing over what of their policies and procedures they felt they needed to retain to keep their standards of admission inviolate and their standards of service to the handicapped high, and how they could rationalize these policies and procedures to accommodate the 504 regulations.

Limitations on numbers of handicapped. One thing seems certain: there will be no "limitations upon the number or proportion of handicapped persons who may be admitted."[9] Or is it certain? Of the eight institutions, the two most experienced made different decisions on the question. In one institution the ceiling on handicapped admissions was dropped. In the other, a college offering specialized services for those with severe orthopedic handicaps, there had been an informal quota on the number of handicapped students accepted on the campus each year. Administrative officials stated that no qualified hadicapped student ever been turned down, but several each year had been accepted pending space available. The college's policy now explicitly states the "space available" concept, with the space limitation applying to two types of applicants: wheelchairs users and those needing full-time live-in services. As one administrator puts it, "If we have more than three wheelchairs in each of our gang-baths, we're going to need a traffic cop!" And of course the number of beds and attendants available for the live-ins is a physical limitation. Whether OCR will accept this "space limitation" concept remains to be seen. Some outer limitations on the number of handicapped, to preclude straining human and physical resources and to maintain standards of service for the severely disabled, seems logical. In at least one mainstreaming university -- one that would probably be considered a model for 504 compliance -- the number of wheelchair users per dorm suite is limited "for sociological reasons."

Another problem relating to numbers of handicapped admissions is that some handicapped applicants may meet the institution's minimum admissions standards but are not as qualified as other applicants. "We have two handicapped applicants right now who pass our minimum-qualifications criteria" said one admissions director, "so I suppose under 504 we could be required to admit them. But they don't measure up competitively in the popular divisions in which they're applying. If we're forced to accept them, we're forced to deny two applicants who are more qualified. We deny 2,000 qualified applicants of all kinds every year. We're in trouble if we have to bend over backwards just for the handicapped alone. This is particularly important for us," he continued, "because we are the only public institution in the state that does not have open admissions. We take only the most qualified students. If we deviate from that policy, we open ourselves to unbelievable political pressure."

The answer to this problem, according to at least one OCR compliance official, is that the regulations require only that all qualified handicapped applicants must be given the same *opportunity to compete for entrance* as others are given. "The regulations," he claims, "do not intend to force a college to take a qualified handicapped applicant over a more qualified non-handicapped one. The prohibition is against denying him admission on the basis of his handicap." But this is not what the regulations state. Section 84.42(b)(1) reads: "May not apply limitations upon the number or proportion of handicapped person who may be admitted."[10] If the OCR informant just quoted is correct, then a written policy interpretation may solve the "problem." In any case it is wise for recipients of federal financial assistance to remember that when "problems" arise, it is safer to consult the regulating agency than to assume that the regulations intend to force recipients into contraproductive policies and procedures.

Reverse discrimination. Until an official policy interpretation is issued confirming the compliance official's reading of section 84.42(b)(1), the possibility of a reverse discrimination problem remains. In such a case the Bakke decision would have implications for handicapped admissions. A flexible admissions policy with no set quotas, minimum or maximum, would seem to be more in line with the Bakke decision than would a requirement to accept all qualified handicapped applicants.

Required admissions procedures. Of the eight institutions surveyed, the small college that serves students with severe orthopedic disabilities requires some of these applicants to attend the college's regular summer school session and perform up to the regular academic standards before a final decision is made on their admission. The stated purpose is to see if the student can "make it" in that college setting. The same requirement is made of non-handicapped applicants who are borderline in other ways. "This is as much a test of the college -- as to whether we can give the student enough of the assistance he needs to compete academically -- as it is of the student. Right now a boy who is paralyzed from the neck down is in summer school. We're knocking ourselves out and hoping he'll make it," said the DSS Coordinator. The institution believes that such a tryout is valid "as a predictor of success in the educational program or activity in question"[11] and that the tryout is therefore allowable under the 504 regulations. If the tryout does, in fact, measure academic ability and not the individual's handicap, presumably it is allowable.

In another experienced institution, independent-management-skill training was formerly required of some handicapped applicants to assure that they could hold their own with non-handicapped peers. Since 504, this program is only recommended for such persons, not required. This rigorous training enabled scores of students to carry on as equals with able-bodied peers. One applicant with no arms and no legs was required to postpone admission one year in order to get the strength and invent the tactics to compete in the university setting. She succeeded in becoming a full-time student in good standing, who needed no attendant care, had a part-time job, sang in the choir and swam. Would any of these students have taken the training if it had not been a requirement for their admission? The answer of militant handicapped groups is that many severely handicapped individuals have learned on their own to manage in college, that the university has no business making such requirements, and that if a handicapped person enters the institution and flunks, it's the handicapped individual's fault, not the institution's. The rejoinder of at least one rehabilitation specialist is, "The last thing in the world that a severely handicapped person needs is another failure." It is true the "another failure" is undesirable, but the 504 regulations are based on the civil rights premise that as long as the individual is academically and technically qualified, he or she has a right to try, as others do, in the regular college sessions. Activists also indicate the extreme importance to a handicapped individual of learning to take responsibility for his own decisions. College is a vital training ground in this respect for any individual.

Pre-admission questions about handicaps. Such questions are forbidden unless an institution is taking remedial action to correct past discrimination or is taking "voluntary action" to overcome "limited participation" by the handicapped. A post-admission, voluntary question may be asked, however, to determine whether accommodations requiring advanced planning are needed. Some informants feel that in order not to delay needed accommodations and thus further handicap the student, they need the extra lead-time that the pre-admission question gave them. "This saves such a lot of time and headache for the student himself," said one handicapped professor. "With the deaf, you really need to know by April, to get all their needs met." Perhaps some experienced institutions will use the "voluntary action" rubric in order to retain the extra lead-time.

Admissions Criteria: Technical Standards. Legal problems have developed in this area. The Supreme Court agreed in January 1979 to settle some of the issues connected with "technical standards" when it takes up Southeastern Community College v. Davis. From higher education's viewpoint, one of the basic questions is, who has the power to decide what the technical standards shall be. From the government's standpoint the question is, whether individual technical standards -- or any other admissions or academic requirements -- are in fact discriminatory.

The definition of "qualified handicapped person" for post-secondary education purposes is one who "meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity."[12] The Analysis declares that "technical standards" are "all non-academic admissions criteria that are essential to participation in the program in question."[13] In practice technical admissions criteria are often based either on "academic requirements" that an institution deems "essential to the program of instruction" or on a professional "licensing requirement" that the individual will have to meet after completing his studies.[14] If the recipient can "demonstrate" that the academic requirements are "essential to the program of instruction being pursued by such student or to any directly related licensing requirement," the accademic requirements "will not be regarded as discriminatory within the meaning of this section."[15]

Graduate and professional schools, of course, are especially affected by this series of regulatory provisions, since so many of these schools have technical entrance requirements and prepare students for occupations that have technical prerequisites. And those schools that also prepare students for professional licensing exams are doubly affected.

To add to the intricacies there is another part of the regulations that could contradict the provision about "directly related licensing requirements." Section 84.10(a) states that "the obligation to comply with this part (i.e., the 504 regulations) is not obviated or alleviated by the existence of any state or local law or other requirement that, on the basis of handicap imposes prohibitions or limits upon the eligibility of qualified handicapped persons to ... practice any occupation or profession."[16] OCR will probably have to make its peace with state licensing authorities where licensing requirements are seen as disciminatory.

In the Davis case admission to nursing school was denied because of a serious hearing disability. Southeastern Community College insists that "sound physical condition and senses" are (technical) standards for admission to and participation in their nursing program, and that Davis is therefore not qualified.[17] The college states that their requirement for "sound senses" is also based on a "directly related licensing requirement" and is therefore not discriminatory under the regulations. The State Board of Nursing Examination apparently indicated to the college that Davis would not be "certifiable" to sit for the exam.[18] ACE's amicus brief lists three major questions: whether 504 requires an institution to "admit a handicapped person whose handicap makes it impossible to participate effectively in the educational program and the career to which it leads,"[19] whether 504 requires an institution to "change its academic requirements ... to compensate for the disability of a handicapped applicant for admission,"[20] and whether 504 implies a private right of action "without resort to federal administrative remedies."[21] The four questions that the Supreme Court will consider are similar to ACE's questions. (See above, Part I, Policy Interpretations.) A critical factor in the case probably will be the fact that Davis has already "participated" in a nursing career, since she has been an LPN at a general hospital for several years. Another factor is the difference of opinion between the district court and the appeals court as to whether the nature of the handicap can be considered in deciding whether an applicant is "qualified."

Medical schools also are mulling over the questions of technical standards and licensing requirements. One of the country's best medical schools has an entrance requirement of sound eyesight. This criterion stems in part from the requirement in some states that all licensed M.D.s must have passed surgery. Also involved is the conviction of many of the school's faculty that proper diagnosis, even for a psychiatrist, sometimes involves the ability to see a rash or a facial expression.

Schools of veterinary medicine have problems with 504's "technical standards." At least one such school requires handicapped applicants to prove that they have both the strength and the dexterity to lift large animals. If such proof is required of all applicants it might conceivably be deemed nondiscriminatory. But section #84.42(b)(2) indicates that any admission criterion having "a disproportionate, adverse effect" on handicapped persons must be "validated as a predictor of success in the education program or activity in question."[22/] Could the weight-lifting standard pass this test? At this point the issue becomes a question of academic requirements rather than admissions requirements, and it will be discussed further under the latter heading.

Prohibition Against Consortia: Admissions. The Analysis, but not the body of the regulations, contains a provision prohibiting colleges and universities from attaining program accessibility through consortial arrangements, on the grounds that this restricts the choice of handicapped students. However, "consortia for the benefit of all students" are allowed.[23/]

In one of the states that has been a pioneer in access for the handicapped, the DVR has over the years worked out a division of labor among colleges and universities, so that one of them has been given funds to develop support services for those with severe orthopedic disabilities, several have been set up with access for the blind and a few for the deaf. In this way each type of handicap could get the best possible services in order to eliminate competitive disadvantages. Since the passage of the 1973 Rehabilitation Act and the promulgation of the 504 regulations, although DVR may still counsel its clients toward the institutions set up to assist them, the counselors can no longer require attendance at particular institutions as a condition of receipt of DVR funds. "I just hope," said one DVR counselor, "that a qualified deaf student doesn't insist on attending an institution inexperienced with that handicap. You have no idea how complicated it is to deal with the deaf at the college level." As a matter of fact, the federal government has for twenty years funded an institute to study the problems of integrating the deaf into regular college classrooms. Suppose a qualified deaf applicant applied to an institution set up at great expense to serve the orthopedically disabled. Should that institution be required to go to the expense necessary to give the deaf student adequate access?

Auxiliary Aids

After a handicapped student is admitted, this is one of the first problems that an institution must deal with, since advance planning is necessary to assure that educational aids, such as interpreters for the deaf and library readers and taped texts for the blind, are on hand when classes begin.

The regulations state that recipients of federal financial assistance "shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills."[24] The Analysis says that recipients "can usually meet this obligation" by having students use "existing resources...such as state vocational rehabilitation agencies and private charitable organizations;" and HEW "expects" that most aids will be paid for by state and private agencies.[25]

As this report was being written, one of the most troublesome 504 problems identified by the Washington higher education associations was the provision of auxiliary aids, especially interpreters for the deaf. The two paramount issues were the critically short supply of interpreters and the question of who pays for them. As for supply, there are, for instance, no interpreters in the state of Vermont and none in all of Dade County, Florida. The 1978 renewal of the Rehabilitation Act contains provisions aimed at increasing the supply of interpreters for the deaf, readers for the blind and other services but it will be some time before appropriations are made and benefits are realized.

A federal interagency conflict and at least three court cases have already surfaced on the issue of who pays for auxiliary aids. In late 1977, RSA (the federal Rehabilitation Services Administration) assured the New Hampshire DVR that because, under 504 regulations, institutions must ensure the provision of such aids, the DVR need no longer pay for interpreters for deaf students at the University of New Hampshire. The American Council on Education intervened with a direct plea to Secretary Califano, quoting the regulations' Analysis. An order went from Califano to RSA to continue payments for all such aids. The fight is not over, for RSA Director Humphreys issued only a temporary order to resume payments, pending further study of the matter. "With more handicapped students now entering colleges, our resources are really being stretched," explained a high RSA official, "and furthermore, some handicapped students are not our clients." Adding to the OCR-RSA disagreement is the accusation of many handicapped students that some DVRs are still refusing to pay for aids.

In at least three recent court cases (Camenisch v. University of Texas et. al., Barnes v. Converse College, and Crawford v. University of North Carolina (W. Carolina University) a deaf student sued to force a higher education institution to pay for an interpreter. No decision as to who pays has yet been announced in any of these cases. In Barnes, the case was dismissed because the plaintiff had not filed a complaint with HEW. In the other two cases the court withheld final judgment pending rulings on the question by HEW. These cases will be discussed further in the section on Compliance and Enforcement, since private right of action is at issue.

Treatment of Handicapped Students; Services for Them

In the section on Overview of the Regulations, attention was called to an omnibus statement outlawing discrimination, in effect, in all other aspects of higher education not elsewhere mentioned. Such things as occupational training, insurance, housing and transportation are included in the statement.

Housing. Probably the most critical housing issue is the possible head-on collision between the 504 regulations and local fire regulations. The requirement that "variety" and "choice" in housing options must be available, when combined with the general caveat for "most integrated setting appropriate," indicates that the handicapped are not all to be housed together. There have been some oral indications from OCR that wheelchair users are not all to be housed on the first floor. But at least one university fire marshall is adamant that his responsibility for student safety precludes any other possibility. Or, as another university's Vice President puts it, "If we housed them above the first floor and anything happened to even one in a fire, I'd never forgive myself." So, despite the fact that the 504 regulations take precedence over any "state or local law or other requirement,"[26] there will be some institutions that will obey the local fire regulations. It is possible that OCR will allow such safety regulations to prevail. After all, OCR has approved NACUBO's Self Evaluation Guide which states that deaf persons "should be located near visible fire signals."[27/] However, handicapped activists insist that it is paternalistic to give them special protection -- protection that they do not get, for instance, if they work above the first floor in an office building. One handicapped activist, banned from local bars and theatres in several localities by "fire regulations," discovered that there was no such prohibition in the fire codes.

Transportation. Shuttle services like Humphrey-Go-Bart and GUTS[28/] will either have to be adapted or supplemented for the handicapped by June 3, 1980. Wheelchairs are the problem; and adapted vehicles are expensive. But if this service (transportation) is not provided for other students, it need not be provided for the handicapped.

Occupational Training: Third Party Compliance. The fund recipient is to assure itself that "equal opportunity" for the handicapped is provided in educational programs "not operated wholly by the recipient" but considered "as part of, or equivalent to" its own programs.[29/] There is a question as to whether colleges and universities can operate some of the off-campus elements of their programs -- be they extension courses or graduate internships -- on this basis. To quote ACE's general counsel, Sheldon Steinbach, "The court house isn't always accessible to law school interns in wheelchairs." But there are several institutions specializing in off-campus student experiences that have already addressed such problems. Their experience should be instructive. Hopefully most off-campus programs are located in, or can be shifted to, accessible locations.

Health and Insurance Programs. Back in the days of the draft regulations some administrators voiced fears about the cost of including handicapped students and employees in health services and insurance plans. There are informed persons, such as personnel directors in the two experienced institutions interviewed, who indicate that the addition of handicapped persons to the community has not substantially raised insurance or health care costs. State laws, the insurance company's methods of calculation, and the particular type of disability, all can affect group health insurance costs. Progressive or debilitative diseases need more treatment than other types of disability. Since most individuals protected by the Rehabilitation Act have stable handicapping conditions, they do not need significantly more medical treatment than does the average able-bodied individual. Hence, under most circumstances, the addition of handicapped individuals to a group should not raise insurance rates.[30/] This is a complicated matter, however, and one to which national associations intend to give study.

"Unnecessarily Different" Services. One of the most important aspects of nondiscrimination in any program, activity or service -- whether it be athletics, housing, transportation or whatever -- is that "unnecessarily different" services are forbidden. For instance, an individual must not be required to live in quarters set aside for the handicapped unless he or she needs such quarters; and no handicapped individual can be forced to take an adapted bus unless he or she needs it. There will doubtless be continuing differences of opinion as to whether a particular service constitutes non-compliance because of being "unnecessarily different" or whether it *is* allowable as being necessary for "equivalent treatment" or "equal opportunity." The big quarrel that militant handicapped groups have with many of the well established DSS programs is that some of their special services are required of handicapped students whether or not the individual student feels that he or she needs them. Such treatment removes the responsibility from the student and serves to make him dependent. Militants feel that DSS offices are OK if they serve only a coordinating or facilitating role. They favor a system under which a list of services and personal aides is made available, with the handicapped student himself contracting for the services and training the aide in whatever help the person needs. In any case, the emphasis should be on the case by case approach to individual needs.

There are critics who believe that rehabilitation centers do not belong on campus at all. But if an institution has a commitment to handicapped access and there are no rehabilitation services nearby, what is the alternative? Without such built-in services, would the boy paralyzed from the neck down ever go to college? The answer implicit in 504's civil rights approach is to make sure that such services are optional. 504 is concerned with ensuring equal educational opportunities, not with supplying individuals' rehabilitation or personal needs.

What can be said about the degree of assistance that handicapped students need in order to have a good chance to compete in college? Probably the best simple answer is that a delicate balance must be struck for each handicapped student, as for any individual, somewhere between a supportive environment and a kick in the pants.

Academic Requirements and Adjustments

This subject ranks with admission issues as one of the primary areas of contention between OCR and higher education. In fact, as indicated earlier, the contention often centers around academic requirements and admissions criteria that are related. From the higher education viewpoint the issue boils down to the question of who should have the final power of decision as to academic requirements. From the government's viewpoint the issue is whether some academic requirements really are "essential to the program of instruction being pursued by such student or to any directly related licensing requirement....."[31] If the federal assistance recipient "can demonstrate" that such requirements are essential, the requirements will not be considered discriminatory. Again, as with admissions, the fear looms of government intrusion into academic freedom and academic decision making.

There is one point on which all three parties -- the regulators, the regulated and the protected class -- agree, and that is that there should be no watering down of curricula. A handicapped individual will have enough difficulty getting a job after graduation. The last thing he wants is a degree that leaves him less qualified than his able-bodied peers.

The regulations require that recipients assure themselves that academic requirements do not discriminate against the handicapped. The NACUBO Self Evaluation Guide suggests that each institution examine all of its graduation requirements and the content, activities and methodologies of all courses. This is a large order, but when the task is divided among departments, it is not an impossible one. Some schools have found it a rewarding task, with pleasantly surprising results. The architecture school at a major university discovered through this process that a sightless student could probably succeed in their city planning curriculum.

A brief look at some academic requirements in five types of academic programs will help delineate the basic issues facing OCR and the institutions. The five are: journalism schools, MBA programs, veterinary schools, medical schools, and nursing schools.

There is at least one journalism school that in recent years has required that all its graduates be able to type at a designated speed. It is not very likely that this requirement could be demonstrated to be "essential" since typing is neither necessary for, nor even universally used by reporters these days.

There are some courses, and in the case of many business schools, some entire curricula, that are primarily discussion-based. Could a deaf student keep up with the discussions? The interpreter would have to deal with several people talking at the same time. Experimentation will probably provide a solution. After all, there are plenty of students who can hear and can talk but who are so inarticulate as to be poor discussants.

In the section on admission issues mention was made of a school of veterinary medicine that requires handicapped applicants to prove that they have the strength and dexterity to lift heavy animals. The acceptability of this criterion would probably turn either on whether lifting heavy animals is validated as a "predictor of success" in the academic program or on whether the lifting is "essential to the program of instruction." There are veterinary schools that choose to retain the traditional emphasis on farm animals, and certainly lifting heavy animals is a basic aspect of that activity. Would such a school be required to change its emphasis? That does not seem likely. But as one commentator said, "You don't go to veterinary school to learn to lift heavy animals. After all, you can always hire someone to do that for you."

Medical schools, as mentioned in the discussion of admissions problems, are evaluating their technical standards for admission and participation in light of the 504 regulations. In at least one prominent medical school the requirement for sound eyesight stems partly from a licensing requirement in some states that all M.D.s must have passed surgery. The section on admissions issues indicated an apparent contradiction in two parts of the regulations dealing with licensing requirements. If section 84.44(a) prevails and eyesight is deemed a nondiscriminatory criterion because of a "directly related licensing requirement," then the medical school in question probably can continue its present policy. If section 84.10 prevails because the 504 regulations take precedence over state laws and requirements, there will undoubtedly be negotiations between OCR on the one hand and medical schools and/or state licensing authorities on the other. There are many in academic medicine who would like to maintain flexibility in admission policies for the handicapped. A partially sighted psychiatrist, for instance, might not be able to pass surgery, but he probably could see well enough for diagnostic purposes. In such a case conditional admission to medical school might be the answer; that is, the individual would be admitted so long as he was not heading for a career that demanded full eyesight. Temple University graduated a sight-impaired M.D. who is now doing his residency in psychiatry. But conditional admission involves "restrictive" counseling and thus runs afoul of section 84.47(b).[32]

Nursing schools face the same kinds of issues as medical schools do, and, as mentioned, the first Supreme Court guidance on technical standards and modification of academic requirements will issue from the case of Southeastern Community College v. Davis. For further discussion of this case see Part I, Policy Interpretations, and Part III, Admission Criteria: Technical Standards.

Aside from "essential" academic requirements and "directly related licensing requirements," a recipient of federal financial assistance "shall make such modifications to its academic requirements as are necessary to ensure "that the requirements do not discriminate.[33/] Suggested modifications include time flexibility for course or exam completion, adaptation of the manner in which a course is given (e.g., taped materials for a blind student when visual presentations are being used), or substitution of another course (music history instead of recordings, for the deaf).

Many problems are solved simply by giving time leeway, and this is an alternative with which professors are familiar. Granting leeway to a "handicapped" student and not granting it to one who is merely slow may present problems of equity, but perhaps most of these are not much more difficult to resolve than those a professor normally faces. This issue was discussed under Definition Problems.

As for modification of tests, often the individual professor can work it out easily with the student. Some experienced institutions have alternative procedures all ready to put into place for almost any handicapped student's needs, thus saving the faculty time and headaches. However, issues of equity can arise. As already mentioned, a federal district court in Gott v. State University of New York, Buffalo, ruled in January 1979 that although some modification of testing procedures was proper for learning-disabled law student Gott, time leeway in exams was not required.

At times adaptation of course material requires careful construction of equivalent intellectual tasks and exercises. Some inexperienced faculty members feel that this is impossible, especially for lab courses, but science professors have researched the matter and come up with course adaptations that reach the same intellectual and skill goals as do the traditional course elements. Teaching the blind mathematics through visual skills instead of figures is one example. OCR and AAAS (American Association for the Advancement of Science) hope to launch a technical assistance project on adapted science and lab courses.

It is possible that arguments could arise over the particular type of academic adjustment a professor chooses. The tone of the regulations and of the Analysis seems to indicate that the professor's or the institution's judgment prevails.

Prohibition Against Consortia: Academic Services

Consortia are forbidden as a means of achieving compliance with the 504 regulations, but "consortia for the benefit of all students" are allowable.[34/] This matter has been covered as it relates to admissions. The non-admission problems are different. Consortial arrangements for specialized courses and facilities are fairly common, especially in the sciences. Through cooperation and specialization the finest technical equipment and instruction are available to students within a given geographic area. If all students at Universities A, B and C take their advanced physics at University A, their advanced chemistry at University B and their advanced biology at University C, that is nondiscriminatory.

But if University B students take elementary physics at their own institution, handicapped students must be allowed to do likewise and cannot be forced to go to University A for elementary physics.

No problems of this sort have yet surfaced on the national level, but given the cost of lab adaptation, some may.

Employment

On paper, the essential employment issue is "reasonable accommodation" (to the employee's limitations) vs. "undue hardship" that such accommodations might impose on a recipient. So far, no court cases on this issue have surfaced on the national scene.

A "qualified handicapped person" is one who "with reasonable accomodation, can perform the essential functions of the job in question." The phrase "essential functions" is a departure from the 503 regulations pertaining to federal contractors, but it does not alter the meaning of employment discrimination. It does, however, require employers to make sure that when a blind typist applies for a typing job, she is not turned down simply because she can't do filing. As with students, a case-by-case approach to the qualifications and the needs of employees is required.

Employers may not make pre-employment inquiries about an applicant's handicaps unless taking remedial action or taking affirmative action required under Section 503. But employers may ask about an applicant's "ability to perform job-related functions."[35] And no test or criterion that tends to screen out the handicapped can be used unless shown to be "job-related for the position in question."[36] The concept of "essential functions" plus "job-related functions" and criteria, forces employers to tidy up their job tasks and descriptions, as well as their interviewing and testing procedures. Some experienced personnel administrators have indicated that although it will take time, this overhaul of their procedures will be helpful to them and is necessary for good personnel practice, in the same sense that affirmative action procedures for women and minorities have been. As one university president says, "Such affirmative action requirements have made us bring the college employment practices into the twentieth century."

Personnel officers in the five experienced institutions in this study reported no problems in handling alcoholics and drug addicts. If such persons do not perform up to standards, they can be terminated. But as the case of Whitaker-Brooklyn College attests, employees, including professors, are starting to appeal such dismissals.[37]

Two new protections for employers have been added against possible problems with drug addicts and alcoholics. OCR's John Wodatch indicated in an article in the Spring of 1978 that active drug addicts need not be employed in positions that might give them direct access to drugs.[38] And the 1978 Rehabilitation Act amendments exclude from the Act's protection any active alcoholic or drug abuser "whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others."[39]

As far as 503 (employment) complaints are concerned, Mainstream, Inc., the most knowledgeable national organization on 503, states that "hidden handicaps have figured in almost every case of alleged employment discrimination to reach the administrative complaint stage..."[40] Many individuals with "hidden handicaps," such as previous heart attacks, fall under the second and third part of the regulations' definition of "handicapped person," that is, one who "(ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."[41] As indicated in Part I (Policy Interpretations), it could be difficult to reconcile the first part of definition with the second and third parts. The decision of a DOL administrative law judge was given as an example. An illustration from one of this study's eight institutions echoes the problem: are buildings and grounds crew members with a history of back problems protected by parts ii and iii of the definition or are they excluded by part i because the handicap has not "substantially" limited one of their major life activities? And how do these legal protections square with safety considerations? It is important for employers to remember that a medical condition is a reason for disqualification from employment only if it is related to the specific requirements of the job. Employers should also remember that government regulators are by and large just as reasonable as they themselves are by and large. For instance, progressive or degenerative conditions are considered by OCR at least under 503, on a case-by-case basis.

Internal Relations; Role Conflicts

As with administration of any other policy, there are bound to be internal disagreements within a college or university on the 504 regulations. Most of those already cited are based on role conflicts, and most administrators have learned long since to adjust for such conflicts. One common 504 role conflict is between the administrators most responsible for access and compliance, and the buildings and grounds personnel. In one of the eight institutions studied, the 504 Coordinator, in making the rounds to see how structural modifications were coming along, told the B & G crew that a ramp under construction was going to be too steep for wheelchair access. A few hours later the crew foreman called the counsel's office and told him to "get that guy off my back!" In this case, a simple misunderstanding was involved, which was soon patched up. Most universities, including this one, have buffers in the form of Space Utilization Offices, Planning Offices, or Vice Presidents for Operations to smooth things over and forestall big conflicts in the physical plant sphere.

Relations with Government; Overlapping Jurisdictions

As of the summer of 1978, only two of the eight institutions had contacted OCR directly regarding problems with the regulations and official answers were slow in coming. All five of the experienced institutions have ongoing contacts with state and/or local agencies on the subject of equality of opportunity or architectural barrier removal or both. In all five cases, state regulations complement 504 regulations more than they contradict them.[42]

The biggest jurisdictional conflict aired so far is the OCR vs. RSA fight discussed earlier, over who pays for auxiliary aids. This is only one part of a continuing turf fight at the national level. Among other things, RSA feels that its years of rehabilitation experience qualify it to be the sole dispenser of technical assistance and that OCR should stick to compliance and enforcement only.

The 1978 Rehabilitation Act amendments expanded the powers of the Architectural and Transportation Barriers Compliance Board. In the process OCR's enforcement and technical assistance powers were somewhat diluted, thus raising the possibility of duplicative, overlapping or contradictory requirements for recipients.

The Compliance Board was established by Section 502 of the Rehabilitation Act of 1973 to enforce the Architectural Barriers Act of 1968 which requires facilities built or altered with federal funds to be usable by the handicapped.

Among other things the 1978 amendments:

-- add "communication" barriers to the Board's jurisdiction;

-- give the Board power to issue guidelines for overcoming architectural, transportation and communication barriers;

-- give the Board power to "insure compliance" with the 1968 Act, including bringing legal actions;

-- direct the Board to provide technical assistance on overcoming barriers, in coordination with other federal agencies;

-- establish a federal Interagency Council to coordinate policies and eliminate "conflict, competition, duplication and inconsistencies" in implementing Title V.[43]

The 504 regulations can conflict with state authority where medical licensing requirements are concerned. The section on problems with "technical standards" for admissions gave some examples. The court case of Southeastern Community College v. Davis illustrates some of the points of contention.

The area of safety regulations also poses possibilities for jurisdictional conflict. And the section on treatment of handicapped students indicates possible conflict with local fire regulations.

Costs of Compliance

The issue of compliance costs has been raised at various points in this report. It is the issue that has captured the most attention nationally and that looms the largest for many campuses, particularly the inexperienced ones.

During the author's site visits attempts were made to get cost estimates from the eight institutions. The small college built to be accessible planned, quite aside from compliance requirements, to improve access in one building. Only the most general information could be obtained for the other seven institutions, and, given the brevity of their 504 experience and difficulties of estimating costs, this information is not very meaningful. The three public institutions, of course, get construction funds from the state, but all stated that competition for these funds is tougher each year, and indications were that federal funds would probably be needed as well. One large inexperienced private university did not, as of summer 1978, see serious cost problems, but its definition of physical access seemed far less stringent than that of another large private university with several years of experience with the handicapped. The latter institution and the other two privates stated that outside financial assistance would definitely be necessary if compliance was to be achieved.

Another way to judge the need for funds is to gauge the information received by higher education associations, and such information overwhelming attests the need for outside funding, including for public institutions. Most of this demand, so far, has been for assistance with structural modifications and with interpreters for the deaf.

The regulations state that costs of compliance will not exempt any fund recipient from the obligation to comply. When Secretary Califano announced the final regulations in April 1977, he stated that Congress "must carefully assess whether additional funds will be necessary if recipients are to comply promptly..."[44/] The question from the higher education viewpoint seems to be not whether additional funds are necessary but how much and for what specific needs -- and how soon the money would be forthcoming.

For many institutions their original high estimates of structural modification costs have been adjusted downward substantially. Staff brainstorming, advice from handicapped consumers, and the "common sense and ingenuity" urged on recipients by OCR, all have played a part. Nevertheless the price tag is still substantial for some institutions, especially the smaller inexperienced ones, and outside funding is imperative. As for nonstructural costs, some observers believe that these could be "sleepers" and might easily exceed the one-shot structural costs. Quite aside from dollar needs, the cry is for federal reimbursement for an expensive, federally imposed mandate.

It is difficult to give meaningful figures on compliance costs. Individual institutions, higher education associations, the Administration and Congress all have tried and are still trying to develop rational estimates on compliance costs. Some of these efforts will be detailed later. There are actually two problems: getting reliable cost estimates that can be used nationally, and arriving at equitable reimbursement principles. Examples of the first type of difficulty were given in the section on Transition Plans. One would think that non-physical access costs, like auxiliary aids, would be easy to reckon. One higher education association has attempted to summarize program access costs and has found these campus figures, too, are hard to compare. As with physical costs, campuses' needs vary. And part of the costs are tucked into regular budget and workloads: an admissions officer's time and cost in setting up alternate testing procedures; a professor's time in modifying course requirements.

In part the difficulty arises from the fact that, under the regulations' flexibility, there is very little specificity as to what structural accommodations and what program features are required. In fact it may be hard to reconcile the need for regulatory flexibility and the need for reliable and specific cost compliance figures. Adding to this is the uncertainty as to what "other methods" of achieving program access besides structural changes are acceptable under the regulations. Even OCR's 8/14/78 policy interpretation on carrying wheelchair users did not help some campus planners determine what access costs are required.

A few random illustrations might help to indicate the magnitude of access costs. In 1977 the cost of installing an elevator was given as $60,000 to $70,000; the cost of a pair of adapted toilets, $2,000 to $3,000; the cost of dormitory doors wide enough for a wheelchair $300 to $700; the cost of a ramp, up to $5,000. The figure for installing an elevator (except when a building is under construction) can vary by several thousand dollars, depending on where it is placed in a building, what the construction material of the building is, etc. And, as mentioned earlier, some costs like simple ramps, are buried in the physical plant budget of an institution.

A 1978 APPA survey of ninety-two institutions resulted in an overall estimated cost of $.45 per square foot for 504-based structural modifications. This leads some informed association personnel to a cost estimate of $1 billion for all of higher education. But all parties acknowledge the extreme difficulty of getting figures that are truly comparable as among institutions.

The OCR/NCES cost survey launched in late 1978 and noted earlier in this text hopes to establish reliable cost estimates. What relationship, if any, this survey will have to that required by the 1978 Rehabilitation Act amendments is unclear from the Act's wording. Under Title IV of the amendments, Section 118(e) amends Section 502(h) of the 1973 Act to require that the Compliance Board submit to the President and Congress within one year a study assessing "the amounts required to be expended by States and by political subdivisions thereof to provide handicapped individuals with full access to all programs and activities receiving Federal assistance."[45] The possibility that all kinds of recipients of federal assistance are included is heightened by the wording of another part of the amendments, Section 120(a), which amends Section 506 of the 1973 Act to authorize HEW and the Compliance Board to provide "financial assistance to any public or nonprofit agency, institution, or organization for the purpose of removing architectural, transportation, and communication barriers."[46] The amendments go on to state that no assistance will be provided "until a study demonstrating need for such assistance has been conducted and submitted..."[47] under Section 502(h), i.e., under the state cost assesements just mentioned.

Even after structural modification cost figures are agreed on, there still will remain the problem of working out an equitable formula for reimbursement of them. Part of the problem is that for the most part no particular structural modifications are required. Equally important is the fear of experienced institutions that they will be left out simply because many such costs are behind them. There are some in the Administration who are sympathetic to this plea.

As for nonstructural costs, one institution quotes $3,000 a year as the cost of an interpreter for the deaf, with the indication that one interpreter can service only three students at a time.

The cost of running a disabled student service office varies widely. In one metropolitan area, two experienced universities with small but efficient operations quote annual budget figures of $6,000 and $34,000 respectively.

One experienced institution estimates an extra annual cost of $7,000 for educating a student with a severe orthopedic handicap requiring 24 hour care, over and above the cost of educating a student without such a handicap. Many mainstreaming institutions, as indicated in the section on Treatment of Students, are against the idea of an institution providing such care.

As for total costs of providing access for the handicapped, figures, again, are difficult to compare. The President of one experienced university reported, "It's a 5.8 million dollar budget item for us for 1977-78."

In September 1977, when the House Select Education Subcommittee held hearings on implementation of the Rehabilitation Act, President Jack Peltason of ACE presented a total 504 compliance figure of $1.5 billion for higher education. Congressman Brademas in chairing the hearings stated that he was "very skeptical" of such high figures and critical of differences in estimates for particular compliance costs. He indicated that no tax dollars would be forthcoming until hard figures were received. Presumably the APPA, OCR/NCES, and Compliance Board studies will fill this gap. A subcommittee staff member, on being interviewed by this reporter, echoed OCR's plea for institutions to use "common sense and imagination" in estimating compliance costs. Estimates should and can be made on this basis, but practically speaking, how can one prove that they are so based? The staff member answered, "By site visits; but these would be too costly."

Several attempts have been made in Congress and in the associations to get financial assistance. In 1977 Congressmen Jeffords and Dodd and Senator Randolph introduced bills for partial reimbursement of 504 compliance costs. For various reasons the bills did not get far. The higher education associations, led by Laura Ford, Assistant General Counsel of ACE, narrowed the search for funds down to Title VII of the Higher Education Act. Title VII, the Higher Education Facilities Act, has never been funded. Eleven associations pressed the administration and Congress for full funding, for loans available under the Title for FY 1979, and for supplemental appropriations for FY 1978. This resulted in an administration request for $50 million in grants under Title VII, but the amount was deleted by the House Appropriations Committee in June 1978 for lack of hard cost figures. Congressman O'Brien then tried to introduce an amendment to the Labor HEW-FY 1979 appropriations bill, to help schools, colleges and libraries with compliance costs, but this amendment was rejected on the floor of the House. Though the stated reason for rejection was unwillingness to single out one class of recipients, the real reason is said to have been the political climate: the appropriations bill hit the floor the day after Proposition 13 won in California. Apparently promises were given in late 1978 in floor statements by influential Congressmen that they would press for Title VII funds for Supplemental 1979, but the Washington associations are not sanguine about the prospects. Both President and Congress are bent on cutting costs and minimizing new outlays in an effort to curb inflation. President Carter's January 1979 budget makes no mention of funds for structural modifications or other compliance costs.

As for the Title VII loan funds, OE Commissioner Boyer did agree to release them, but they are only a drop in the bucket and the money is to be used also for costs relating to energy-saving and to OSHA, the Occupational Safety and Health Act.

The only current possibility is the 1978 Rehabilitation Act amendments which authorize the granting of financial assistance to nonprofit recipients for removal of architectural, transportation and communication barriers, as mentioned earlier in this section.

Both the 1968 Barriers Act and Section 504 of the Rehabilitation Act state that any new construction accomplished with federal funds must be accessible. This is not expected to impose too great a financial burden on recipients. It is estimated that accessibility features will account for 1 - 2% of the total cost of new construction.

Except for interpreters for the deaf, 504's program access costs have received little attention. Traditionally state DVR's and charitable agencies have paid for many auxiliary aids such as interpreters for the deaf and readers for the blind. Short-term grants have also been helped. DSS Coordinators have "hustled" local groups. But always the institution's budget assumes a large part of the nonstructural access costs. The 1978 Rehabilitation Act amendments provide for increasing the availability of services for the blind and deaf, but the Act's language is confusing as to who bears the costs of such services.

This report's section on Auxiliary Aids chronicled the continuing RSA-OCR warfare over who should pay for auxiliary aids under 504. By late 1978 exasperation was running high in the Washington associations, with mutterings about legal action to force RSA to continue (or resume) these payments.

Colleges and universities and their associations continually feel the need to remind the government that they cannot pass on all costs to their customers as business can, and that they are operating at the margin.

Feedback from the Handicapped on Campus

In each institution visited, at least one handicapped student was interviewed. The assumption was that some militancy, some dissatisfaction with pre-504 access would crop up. The only negative reaction encountered was in the institution that had been split by the regulations. Here the division was between the handicapped, including those running the DSS office, and most of the rest of the institution. It is, of course, too early to tell whether handicapped students admitted to any institution since the final regulations, will be more militant.

Benefits and Burdens of the Regulations: Overview

Usually the last question in the eight sets of interviews was, "Do you think that these are good regulations?" This elicited philosophical answers, some of which were quite different from answers to the questions about specific problems with the regulations. Several of the informants said that it will take a long time to see the implications of the regulations and that whether they are "good" or "bad" depends on how they are applied and interpreted by OCR. "We hope that OCR will be reasonable. We'll know when specific problems arise," said one administrator.

Some of those interviewed were concerned about the cost and the personnel that had to be added for each set of regulations. Oddly, few people mentioned the enormous amounts of time spent both on compliance chores and, apart from 504, on provision of access. The time-burden was obvious even though the work was generally spread around and the amount of time spent was hidden, as personnel worked nights and weekends or cheated a bit on the rest of their job. One Affirmative Action Officer who had been designated as 504 Coordinator acknowledged that two-thirds of her time for the previous four months had to be spent organizing the Transition Plan and Self Evaluation. In another institution the architect's files on 504 in particular and handicapped physical access planning in general are eighteen inches deep. Robert Scott points out that the "time-intensity" of government requirements, that is, the amount of administrative time they require, is a problem that has received insufficient attention.[48/]

For some, 504 seemed to be less demanding than other regulations, particularly as far as red tape or paperwork are concerned. Part of this benign reaction must be relief from the figuring of utilization analyses, goals and timetables required by affirmative action for women and minorities. As far as number of pages is concerned, some Transition Plans bid fair to being as long as some Executive Order affirmative action plans.

For three of the five experienced institutions 504 was a boon: a catalyst for needed improvements, leverage for more clout and higher priority in institutional administration decision-making, and a legalization of rights that DSS Coordinators had been fighting for. It also helped experienced colleges and universities institutionalize previously informal procedures and forced them to make inventories of accessible facilities.

It was difficult for this interviewer to get a sense of whether colleges and universities conceive of the 504 requirements as skewing institutional priorities or interfering with institutional autonomy. Only one reaction to this effect was articulated during the interviews. Two more reactions of this kind were encountered elsewhere. Perhaps more will crop up as structural modification costs vie for scarce funds -- or as nonstructural costs such as interpreters for the deaf come to the fore. Perhaps the intrusion of the interviews colored the replies; who wants to be written up, even anonymously, as being opposed to the handicapped? But in no case did the author find the extreme anti-regulation reaction that is documented in some of the Sloan Commission self studies. It is worth repeating that this study includes one of the self-study institutions -- one with documentation of serious problems with government regulations.

Three negative reactions are worth recounting because of the importance of the issue raised. One president of a research university in speaking informally to a small gathering, stated that 504 "creates a distortion of priorities." The university, situated on a hillside, has never had a wheelchair student. A half million dollars is all that was available that year for structural work, and all of that was earmarked for deferred maintenance items. "We have been offered a priceless collection of original mathematics treatises, including works of Copernicus," said the president, "but we can't accept it unless we fix a leak in the roof of the building where it would be housed."

Another negative reaction was from an associate dean of a graduate school in one of the eight institutions interviewed. The 504 Coordinator for the graduate school projected "only $60,000 for structural modifications -- and over three years, we can manage that." The dean's reaction was, "Only $60,000! That's more than our operating surplus for several recent years! What should we do? Cut back on programs? Fail to give salary increases to faculty we need to keep?"

A third story concerns a university that is in such financial straits that in many departments, as professors retire, none is being replaced. The Philosophy Department now consists of only two assistant professors. Should the university be required to spend such scarce resources on access for the handicapped when a university in the same city is already accessible?

Some Problem Solutions

Before leaving the discussion of problems raised by the regulations, some mention should be made of the types of problem solutions that colleges and universities have invented - most of them pre-504 but all of them in the spirit of experimentation and common sense that HEW urges on fund recipients.

- Spreading the access chores around is a common -- and a money-saving solution. Usually the DSS Director acts as coordinator and resource. The key is to have each campus segment (admissions, counseling, faculty, etc.) deal with each handicapped student as nearly as possible the way they deal with any other student -- and this, of course, is a key to 504 compliance. Campus-wide committees and handicapped student organizations also help out with the chores.
- Many experienced institutions, including all of the five studied, work closely with the local community and with the state to accomplish access. In one case hundreds of local volunteers act as aides or interpreters.
- The community college surveyed, in need of transportation for its hundreds of commuting students,worked with the mayor to start a transportation system for all handicapped persons in the area. Institutions that have worked in such ways over a period of years end up with an aware community that chooses on its own to become barrier-free.
- In one of the experienced institutions a DSS official has helped the state write access codes and civil rights legislation that have resulted in access to all sorts of activities for students and others.
- Many institutions are clever at using their built-in resources. Work-study students or engineering or architecture students do the Transition Plan survey; CETA employees make ramps; the A/V service helps with transcriptions for the blind.

- The alumnae of one college provided an adapted bus: "Gift of the class of____".
- Another college got a HUD grant to design adapted mobile homes for the handicapped.
- The cost-estimator in one university architect's office -- a whiz at ingenious solutions -- invented a cheap visible fire alarm for the deaf; he tapped into the lighting system, so that the lights blink whenever the fire alarm rings.
- Officials at two of the eight institutions are thinking in long-range terms about national campaigns to make all building hardware easily usable by the handicapped or to make all access features blend aesthetically with their surroundings and be more useful to all persons. That is the essence of mainstreaming.
- When problems emerge, many institutions "brainstorm" for the solutions. If it is a physical access problem, buildings and grounds crews can help brainstorm.
- To come full circle: all experienced institutions are sophisticated -- so sophisticated that they identify new access problems that need solution.

IV. COMPLIANCE AND ENFORCEMENT

Compliance and Enforcement Procedures

"What is the difference between compliance and enforcement?" The answer given by Raymond Keith, Equal Opportunity Specialist in OCR's Compliance and Enforcement section, was, "Compliance is a voluntary concept. We do our best to get voluntary compliance first. If all efforts for voluntary compliance fail, we go to enforcement." He then reminded the interviewer that the 504 regulations set up a self-compliance system. After the assistance recipient sends in the assurance of compliance, it works out its own methods of achieving and monitoring compliance under the flexible guidelines of the regulations. The required written documents -- chiefly the Transition Plan and the Self Evaluation -- are free-form and are maintained at the institution.

The regulations, as noted in Part I of this report, will utilize the compliance and enforcement procedures of Title VI of the Civil Rights Act until consolidated civil rights procedures are completed by HEW. The basic system is simple. Compliance oversight is through written complaints, received in the OCR regional offices from either individuals or groups, and through OCR compliance reviews of recipients. The initial stage of a review is a desk audit in the regional office. If this audit indicates the possibility of noncompliance that cannot easily be resolved, then a site visit takes place. Site visits take from a few days to a couple of weeks, depending on the size of the institution. The large research universities with substantial government grants and contracts automatically get annual pre-award compliance reviews. If there are still problems that, after discussion with the recipient, cannot easily be resolved, a hearing with an HEW administrative law judge is next. The final option, rarely used, is referral to the Department of Justice's Civil Rights Division. Fund termination is, of course, the ultimate sanction -- one not yet resorted to by HEW, though the University of Maryland has had a bad scare. The Maryland case emphasizes an explicit provision in the Title VI C&E procedures: termination of, or refusal to grant funds "shall be limited to the particular program, or part thereof, in which such noncompliance has been so found."[1]

Complaints

Quite apart from OCR's backlog of complaints, which will be discussed shortly, some aspects of the complaint system rankle higher education. Here are two illustrations drawn from campus experience with Titles VI and IX. Apparently some complaints are officially received by OCR regional offices by telephone rather than in writing. This violates Title VI compliance procedures and brings up the subject of the Frivolous Complaint. According to Jerold Ward, a top official in the Compliance Programs Branch with twelve years experience in OCR, "These represent only a minority of cases, and we're trying to tighten up on them. We have standard operating procedures for informal checking with the complainant and the fund recipient to see if the discrimination could really have occurred. All this is supposed to be done before demanding a lot of records."

As for processing complaints, John Wodatch, Chief of the Handicapped Discrimination Branch of OCR, stated that OCR had, by September 1978, received almost two thousand complaints of alleged discrimination under 504 involving all types of recipients. As of January 1979, 929 of these had been completed, 535 were under investigation, and 514 were backlogged.[2]

July 1, 1979, is OCR's target date for eliminating the backlog. A 1978 increase in Congressional appropriations and a consequent doubling of staff has speeded up complaint processing and should help achieve the goal. President Carter's 1980 budget, submitted to Congress in January 1979, assumed attainment of this goal and hence recommended reduction of allocations to OCR.

A heartening bit of news surfaced in July 1978. OCR has instituted a trial program in three of its ten regions, to speed up the handling of all kinds of discrimination complaints against colleges and universities. The method is to bring the parties together and attempt to mediate with a 45-day time limit. If successful, the use of this technique will be expanded.

Private Right of Action

Does the complainant have a private right of action? In other words, does the complainant have a right to bring legal action in court? This is a critical matter that involves the time, money, and rights of all three parties in 504 matters: the handicapped individual, the institution, and the government. The regulations' Analysis states that the executive branch of government cannot confer such a right, but that there is "case law holding that such a right exists."[3] Four cases are cited, including *Lloyd v. Regional Transportation Authority* (a pre-regulations 504 case) *and Lau v. Nicols*, a case involving some Title VI issues but not brought under Title VI. The Lloyd case was discussed briefly in Part I.

There is language in the 1978 amendments to the Rehabilitation Act that implies a private right of action under 504. Section 505, added to Title V by the amendments, states under (b): "In any action or proceeding to enforce or charge a violation of a provision of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."[4]

The American Council on Education contends that no private right of action exists under Title VI, Title IX, or Section 504. It contends that the plaintiff must use the administrative remedies outlined for these titles, and that the plaintiff's only recourse after such remedies are exhausted is judicial review of HEW's decision; that is, the plaintiff can then only sue HEW, not the institution.

On the basis of its private right of action position, ACE has filed an amicus brief in three 504 cases that were in the courts as of January 1979. Two of the briefs were filed in appeals court cases: Whitaker v. City University of New York (Brooklyn College) et. al., and Camenisch v. University of Texas, et. al. As mentioned earlier, the third case, Southeastern Community College v. Davis, will be heard by the Supreme Court. The court will consider two private-right-of-action questions in Davis: does 504 imply a private right of action; and if it does, must the individual first "pursue and exhaust" available HEW administrative remedies.[5] The ruling in this case will provide the first definitive court guidance on 504 and will presumably end the differences of opinion among lower court judges as to whether "'a meaningful administrative enforcement mechanism'" does now exist.[6]

ACE's arguments state higher education's case, but what positions are taken by HEW and by the handicapped? Organizations of the disabled appear to agree with HEW on the existence of a private right of action, but at least some of these groups take issue with HEW on the subject of the complaint backlog.

HEW officials maintain that because of the department's heavy civil rights burden and limited resources, other alternatives than HEW complaint machinery must exist. "It has been a longstanding HEW civil rights practice not to require exhaustion of a recipient's grievance procedures before accepting a complaint for investigation. The Department also believes that it is not necessary for a complainant to exhaust HEW's administrative enforcement procedures before going to court," says OCR's John Wodatch.[7]

The OCR compliance backlog and the length of time it takes HEW to process complaints were key issues for the plaintiffs in four recent 504 cases already mentioned: Barnes v. Converse College, Crawford v. University of North Carolina (West Carolina University), Camenisch v. University of Texas, and Doe v. New York University. In the Converse College case, if Barnes, a deaf teacher, couldn't get an interpreter, she couldn't keep up with her courses. If she didn't complete six newly required courses, she risked losing her job. In all four of these cases the court ruled that the complainant should first try administrative remedies before resorting to the courts. The existence of an OCR backlog was, in the Barnes case, ruled "insufficient to override the Congressionally envisioned administrative scheme of giving HEW 'responsibility for implementing a uniform enforcement policy.'"[8]

It is important to note what advice the American Coalition of Citizens with Disabilities gives to handicapped students on the subject of complaint procedures. The Coalition recommends that the individual first exhaust the regularly established institutional grievance procedures, then go through the established HEW procedures, and finally if necessary, utilize private right of action.

Adams v. Califano: OCR's Annual Operating Plan

The National Federation of the Blind, through its Washington office director, James Gashel, became part of the Adams v. Califano civil rights enforcement case in October 1977, as plaintiff-intervenors on behalf of handicapped persons. Their reasoning was that OCR's own statements indicate that its limited resources and heavy workload would make it difficult for the agency to enforce 504 effectively. In the Adams settlement there are court-ordered time limits for completion of complaints and of compliance reviews; OCR's FY 1978 and FY 1979 Annual Operating Plans (AOP's) reflect this mandate. About 800 extra personnel were added to OCR to assist this effort. One wonders whether even with extra personnel, the quality of enforcement efforts might not suffer under shortened time limits.

Both the FY '78 and '79 AOP's utilize a "balanced compliance program," balanced between complaint investigations and compliance reviews. Compliance reviews help the staff to focus attention on compliance issues not adequately covered by complaints.

Compliance Reviews

Statistics on OCR compliance reviews during FY '78 indicate that 19 out of 133 compliance reviews were devoted solely to 504.[9] It is difficult from the Washington-association perspective to locate any except at the University of Minnesota in January 1978. And this review, from comments of university observers, seemed to be largely a trial exercise for OCR personnel.

504 questions were supposed to have been part of the FY '78 multi-subject pre-award compliance reviews of large research universities. The

two institutions studied in this report that had pre-award reviews in the Spring of 1978 got only a few desultory inquiries about 504. The newness of the subject matter and the lack of standards for conducting 504 reviews may have caused a delay in OCR's schedule.

In any case, the FY '79 AOP projected a sizeable increase in the number of 504 compliance reviews, and by January 1979 there did seem to be increased compliance activity on campuses.

One of the principal tasks of OCR's Compliance Programs Branch in Washington for 1978 and 1979 was the composition of manuals for regional personnel on how to conduct 504 investigations and reviews. The instructional task is not an easy one, for to begin with, regional personnel must be sensitized to what constitutes discrimination against the handicapped, and as has been indicated, this is not a simple matter. The two Compliance Programs Branch officials interviewed indicate that, without precedents in training personnel for this function, OCR "is still learning."

A few more points need to be made on the subject of compliance reviews. There has been widespread university unhappiness in recent years about the attitude of some OCR investigators on campus -- their alleged assumption of the institution's guilt, their lack of understanding of how a university works, etc. When one presents these complaints to OCR officials, the answers range from, "True, but that's a small minority and that was several years ago," to "Give us time; we're still working on it." Whether universities find the 504 regulations a good thing or a bad thing could depend in substantial measure on the behavior of OCR personnel on campus.

The two institutions studied that had 1978 pre-award reviews have nothing but praise for the government officials conducting them. In both cases, one regional official has been assigned over the years as the liaison with and expert on the institution involved. Actually in one of these cases the liaison person was a Department of Labor representative, not an OCR one, but in recent years, and until the administrative reorganization of equal opportunity responsibilities in late 1978, DOL and OCR conducted joint reviews. There is some indication that this kind of praise is reciprocated. One regional OCR official indicated that the big research universities are generally found to be in compliance. "They've learned the system; and they know they have to be in compliance." In answer to a follow-up question the informant indicated that she did not mean "learn the system" in a pejorative sense. In that region, at least, compliance officers specialize in various types of recipients; the informant was a higher education specialist, not a 504 specialist. This type of specialization should lead, and probably has led, to a better governmental understanding of the higher education world.

One of the Washington OCR interviews brought the news that Secretary Califano would like to have Program Officers in the operating units of HEW (such as NIH or the Bureau of Higher and Continuing Education) do the pre-award compliance reviews. Apparently a new OCR division has been set up for the purpose. This might save time and reduce the number of government officials on a campus, but would it result in good civil rights oversight? Isn't a role conflict involved here? After all, the Program Officer is interested in seeing that the program is funded. Incidentally, there are indications of resistance to this plan by program officers. In any case, several OCR officials placed stress on the agency's desire to institute compliance procedures that would reduce the number of court cases.

Mention should be made again of the strengthened compliance powers granted to the Architectural and Transportation Barriers Compliance Board by the 1978 amendments to the Rehabilitation Act. The Board is now authorized to issue guidelines under and ensure compliance with the 1968 Barriers Act, and indeed the Board has already begun compliance reviews of federally occupied or federally funded facilities.[10/]

V. JANUS

What lies ahead, and what lessons does the 504 story hold for government-higher education relations generally?

Issues

Some of the issues discussed in this report will probably be resolved within a year or two. "How-To" assistance for compliance tasks and for making structural modifications will probably no longer be needed on a national scale. Higher education associations and government personnel will have to find a reimbursement formula that will result in some financial assistance to recipients.

The Supreme Court, in the Davis case, will have settled the question of whether a private right of action exists under 504 and either settled, or given substantial guidance on, the relation between such a right and HEW's enforcement machinery. The Davis decision will certainly clear up some of the questions as to who falls under the protection of the Rehabilitation Act. It should also narrow the area of controversy around technical standards and other admissions issues, as well as around licensing requirements and academic modifications. But it is unlikely that the Davis decision alone can resolve all of the complexities of those issues.

As for who pays for auxiliary aids, hopefully some satisfactory arrangement will end the present standoff between OCR and RSA within a year or so. Pressure from the handicapped community and higher education associations may be the catalyst. Alternatively, since one case on this issue (*Camenisch*) is already in appeals court, the final resolution could come through the court process.

Some issues will be around as long as the 504 regulations are, because of the fact that so many access decisions must be made on a case-by-case basis. For instance, there will always be need for interpretation of the regulations — for guidance as to how they apply in individual cases, in such matters as "equal treatment"; "equal opportunity"; "unnecessarily separate or different aids, benefits and services"; and all of the other phrases relating to program accessibility.

Some of the program-accessibility phrases may lead to head-on confrontations because of their vagueness. One can conceive of conflicts as institutions use "other methods" than structural modification to achieve program accessibility. Carrying a wheelchair user upstairs is an example. If OCR did forbid carrying in a particular instance, would its case stand up in court on the basis of the "most integrated setting appropriate" doctrine in the regulations, or would a court determine that the "any other method" doctrine was more in accord with legislative intent?

Even the word "program" is ambiguous in the regulations, since it seems at times to refer to an institution's entire program and at other times to refer to specific parts of it, such as a medical school. This calls to mind the argument of University A's assistant counsel, challenging the scope of the regulations because they affect parts of the university not receiving federal assistance.

Other serious conflicts could develop as to the balance-point between opposing concepts. Where is the line to be drawn between services that are necessary for "equal treatment" or "equal opportunity" on the one hand and "unnecessarily different" on the other, or between the employment concepts of "reasonable accommodation" and "undue hardship"? Although more specific guidelines in these two areas are doubtless necessary, probably the balance must ultimately be attained on a case-by-case basis.

Without being a Cassandra, it is possible to foresee court cases based on the fact that unequal treatment can result from the flexibility of the regulations. A handicapped student might sue if one institution offered less access than another. An institution might sue if, in the absence of written OCR interpretation and faced with the regulations' deadlines, it had made expensive structural modifications only to find that a later dictum deemed the modification unnecessary. As Herbert Kaufman puts it, "Only precise, specific guidelines can assure common treatment of like cases."[1] This is an area in which trade-offs have to be made. Colleges and universities have in the 504 regulations the flexibility that they have been demanding. Some unevenness of treatment is inevitable. Consultation among the three parties, perhaps along the model of NACUBO's Task Force on 504 Problems, should result in narrowing of differences in treatment. But surely it behooves the protected class and the assistance recipients to take advantage of the sought-after flexibility and accept possible unevenness in treatment as the other side of the coin.

The most serious 504 problems may be in the two areas in which there is possibility of excessive governmental intrusion into institutional autonomy: admissions and academic adjustments.

The initial question from the government viewpoint is: is this recipient's practice discriminatory? The initial question from the higher education viewpoint is: whose interpretation, whose decision on the application of key concepts to individual cases shall prevail -- OCR's or the institution's? As time, and probably also court cases, progress, the crucial question becomes: in what ways and to what extent should the government intervene in academic decision-making in the name of social justice?

Admissions. When the intervention issue relates to admissions, the questions become: how much say can OCR have in decisions on academic and technical standards, and can OCR impose on college admissions policies a requirement of specific numbers (that is, that *no* qualified handicapped applicant shall be turned down)?

As for limitations on numbers, it was indicated in the section on admissions problems that one experienced institution finds it both inequitable and difficult politically to admit all qualified handicapped applicants when they turn down hundreds of qualified applicants of other types. Should they be forced to make an exception for the handicapped, or does this constitute undue intrusion into institutional autonomy? In the Bakke case, Justice Powell cited favorably Harvard's model for assuring that "'*with a number of criteria in mind*...(the university) pays some at*tention to distribution among many types and categories of students*.'"[2] Hopefully the OCR compliance official quoted in the discussion of admission problems is correct and the regulations are not intended to curtail an institution's selection of students from among qualified applicants.

In the small college set up to serve the orthopedically disabled, the problem posed by the requirement to admit all qualified handicapped individuals is different. Would a court really force the college to accept a deaf applicant and thus divert resources devoted to first-class services for the orthopedically disabled? The institution chose to serve well one type of disability. How far can government intrude in such a decision when it was made in the spirit of the Rehabilitation Act?

The question of how much voice OCR can have in institutional decisions on academic and technical standards will face its first major test in the medical area. Southeastern Community College v. Davis is the vehicle. This case was discussed in Part I under Policy Interpretations and Part III under Admissions Criteria and Academic Requirements. Because admissions standards are so often related to academic requirements, the issues are discussed under the following heading.

Academic Requirements and Adjustments. Courts have been reluctant in the past to substitute their judgment for the academy's, but discrimination of various kinds is still evident and the courts now seem more inclined to intervene in academic matters. At this moment in the history of the 504 regulations the questions seem to be: how far can the government go in questioning whether certain academic requirements are "essential"? In what ways must an institution "demonstrate" that requirements are essential? Can an institution be required to modify its academic requirements? What should the relationship be, for nondiscrimination purposes, between academic and technical requirements and the requirements of occupations, especially highly skilled professions, and what is the college's or university's responsibility in this area?

As the discussion in Part III indicated, technical standards for admission are often based on academic requirements that an institution deems "essential to the program of instruction," and in professional schools both the standards and the academic requirements can be based on licensing requirements. This is true in the current Davis case. Because patient safety is involved, technical standards, academic requirements, and licensing requirements are particularly crucial in medical education. The issue there can become: where should the line be drawn between considerations of patient safety and discrimination against the handicapped in the medical professions — a discrimination that surely does exist. 504's mainstreaming thrust may face its stiffest higher education challenge in this area.

To relate the above issues to another broad context, the question must be addressed as to the respects in which the 504 regulations actually do take precedence over state and local laws and requirements, and this, again, brings up the possible conflict between sections 84.10(a) and 84.44(a) of the regulations, discussed in Part III, Technical Standards. The answer to this question probably turns on the definition or interpretation of the word "qualified" in the phrase "imposes prohibitions or limitations upon the eligibility of qualified handicapped persons to... practice any occupation or profession."[3]

There is one further issue, based on a hypothetical situation and centering around the question of who has the final decision as to what type of "academic adjustment" shall be made in individual cases and as to whether the type of adjustment chosen complies with the "most integrated setting appropriate" doctrine. If a professor chooses to adjust his course's requirements by substituting another course rather than adapting his course, and if the handicapped student objects to this alternative, does either the student or OCR have a right to question this kind of academic decision?

There are other problem areas that could become major issues: the breadth of the definition of "handicapped person"; the prohibition against compliance by consortium; responsibility for third-party compliance; lab accommodations; and possibly campus relations with OCR compliance personnel.

Finally, the accretion of governmental burdens on colleges and universities could cause outright conflict with the government, and the financial burdens of 504 might be the trigger. No one set of governmental requirements can be said to force an institution into bankruptcy; there are too many other factors besides governmental requirements that can cause colleges and universities to operate at the margin. But the cost of structural modifications, especially elevators, might tip the balance. And if it did, would a court require a college to install an elevator instead of carrying a wheelchair user upstairs? This question would probably be particularly acute in those institutions whose income derives substantially from tuition payments, for in such cases most of the cost of providing access for a few students would be passed on to all the other students.

As indicated in Part III's discussion of problems, some of these issues might simply be imaginary horribles, to be dispelled in the morning light of reasoned discussion among the regulators, the regulated, and the protected class.

When the final regulations were issued in 1977, it was announced that Secretary Califano would review them after a year to see if they were effective or needed revision. One year is too short a time for such an assessment, but an assessment must be made at some point. It is to be hoped that such judgments will include substantial inputs from both the regulated and the protected class.

Conclusions

What does the 504 story tell us about the interrelations of government and higher education? The following conclusions emerge:

- *The government is capable of taking into account the uniqueness of higher education*. Two aspects of the 504 story illustrate OCR's acknowledgement of this uniqueness: the fact that a separate section of the regulations is devoted to higher education, and the fact that, at least in one OCR regional office, a few compliance officials specialize in higher education. There are indications that this specialization has led to a better understanding of the ways in which higher education functions.

- *There are areas in which good relations do exist between government and higher education*. Relations between OCR regional specialists and the research universities are an example.

- *The government has paid attention to higher education's demand for flexible regulations, minimum reporting, and self-regulation*. With 504, OCR has made improvements over past performance in these respects. Such improvements, coupled with OCR's plea for creative experimentation, may go far to account for the minimal degree of resistance to the 504 regulations that this study encountered.

- *The regulations' emphasis on case-by-case solutions to access problems could serve as a model for government mandates in other* areas of discrimination. It is, after all, the approach that most nearly resembles the ideal behavior toward others: treating each person as an individual and on the basis of his or her own merits.

- The flexibility of the regulations has been beneficial, but it involves some trade-offs. To date the principal disadvantages of the regulations' flexibility are the need for their further clarification and the delay in issuing official interpretations. Certainly such delays are not inevitable. Assuming stabilization of high-level personnel, OCR should be able to work out an efficient internal policy clearance system. Other government agencies can get policy clearance within a few days. However, the fact that OCR is always working on new problems at the cutting edge of democracy and justice, is bound to slow down the resolution of issues. The "policy interpretations" issued through HEATH have been invaluable, but they do not substitute for official ones. Ideally, a hotline and technical assistance should be in place the day any regulations are issued. Another inevitable disadvantage to flexible regulations — one that has not yet surfaced vis-à-vis 504 — is unequal treatment, uneven justice. Finding ways of retaining desirable flexibility of the regulations while affording similar treatment to like cases is bound to test the administrative mettle of OCR and the creativity of all three parties in the days ahead.

- It is useful to all three parties in anti-discrimination regulations to have the regulated step forward, early, to work cooperatively with the other two parties (government and the protected class) in a joint-problem-solving mode. The HEATH project enabled higher education to get information and How-To assistance in a familiar, non-threatening manner. The first place to turn for assistance is to one's peers. And institutions wishing to maintain a low profile on their compliance activities could, through HEATH, get information without confronting the regulatory agency directly. To some extent HEATH also enabled higher education to help shape the regulations.

  For government officials and handicapped organization representatives, HEATH illustrated that higher education can cooperate instead of resisting regulations. Without such a mechanism it is difficult for both the government and the protected group to get any information on the reactions of higher education except for what hits the newspapers, and that information often gives a distorted image. Perhaps the governmental relations activities of the Washington-based higher education associations can develop new means to ensure that such coordinated approaches are in the future attempted at the earliest possible moment.

- Confrontation between government and higher education is not inevitable if two factors are present: (1) a carefully constructed mechanism for cooperation; and (2) reasonable people concerned more with problem solving than with turf or with their own perspective. As HEATH demonstrated, the first can abet the second.

- The mandate for assistance recipients to consult with interested persons, including the consumers, has several benefits. Obviously the basic reason for this requirement is to give the institutions the benefit of handicapped persons' expertise. But another advantage is the value of communal problem-solving.

- Especially where regulations are flexible and further interpretation is needed, a feedback loop and/or a continuing mechanism for sharing information, problems and points of view among all parties is necessary. With any new regulations a feedback loop is needed, so that problems created by the regulations can be presented to the government as early as possible. Projected HEATH II activities could be precisely this kind of mechanism. To be useful, feedback must be detailed. As Herbert Kaufman has said, "What we need is...the delicate wielding of a scalpel rather than furious flailing about with a meat ax."[6] There is further advantage to a cooperative approach as opposed to traditional adversary proceedings. The solutions are more likely to be practical and palatable if worked out by the principals, and certainly this process is quicker and less costly. OCR's new procedure of bringing the two parties together, in case of a complaint, is a step in the right direction.

- Finally, there are dangers of intrusion into institutional autonomy and dangers from the accretion of governmental burdens on higher education. As Carl Kaysen puts it, the academy feels that its "central concept of collegial decision by academic peers"[5] is threatened by regulation's intrusions. Collegial decision making, he explains, "has evolved to provide the sustaining environment for the intellectual activity that is the heart of higher learning."[6]

All three branches of the federal government have on occasion demonstrated sensitivity to the danger of government intrusion into university affairs. The hope is that where 504 presents such dangers, suitable accommodation can be worked out early.

As for governmental burdens, they probably accumulate in direct proportion to the fine-tuning of emerging concepts of "liberty" and "justice." Higher education cannot be excused from its share of the burden of approximating evolving social norms. Indeed higher education must be a leader, not just in identifying issues on the frontiers of social justice, but in using its unequalled brain power in achieving social justice.

Self-regulation may be the key to easing the burden of government mandates as well as giving expression to higher education's own sense of responsibility. The 504 regulations point the way through their self-compliance aspects and their mandate for involvement of interested persons. Higher education independently is moving in the same direction. ACE and NAICU both have begun projects on Academic Community Self-Regulation. If the academy can indeed regulate itself effectively -- effectively from the standpoint of the government and other concerned parties, then government-higher education relations can reach new levels of positive accommodation.

NOTES

I. THE LEGAL AND REGULATORY SETTING

1. Statement by Joseph A. Califano, Jr., Secretary of Health, Education and Welfare, *HEW News*, 4/28/77, p. 1

2. A 1976 survey commissioned by the U.S. Office of Education found that between 500 and 600 colleges and universities served the handicapped. Golley, E. and Bennett, A., *The College Guide for Students with Disabilities*, Cambridge: Abt Associates, 1976.

3. *For Your Information*, Circular Number 209, 2/3/78, National Association of State Universities and Land-Grant Colleges, p. 2.

4. P.L. 93-112, 93rd Congress, H.R. 8070; 9/26/73.

5. P.L. 93-516, 93rd Congress, H.R. 17503; 12/7/74. The brackets are added to indicate that part of the Act's definition that is ommitted in the regulations' definition.

6. Actually the body of the regulations, aside from compliance and enforcement, takes up seven and one-half pages. There are nine pages of explanation, called "Analysis."

7. Senate Report #93-1297, 93rd Congress, 2d Session, 39-40 (1974) as quoted in Harvard University Law School's unpublished case study of the 504 regulations: Mark Engebretson, 4/4/78 draft, p. 8.

8. Op. cit., p. 8-9.

9. From *Comprehensive Rehabilitation Services Amendments of 1978*, Conference Report to accompany H.R. 12467, 95th Congress, 2d Session, House of Representatives, Report #95-1780.

10. *Federal Register*, Vol. 42, #86, 5/4/77 (to be codified in 45 C.F.R. #84); hereinafter cited as Final Regulations. Here #84.4(a), p. 22678.

11. See the section on Legislative History, above.

12. Final Regulations, #84.3(j)(1), p. 22678.

13. *Op. cit.*, #84.3(j)(2)(ii), p. 22678.

14. *Op. cit.*, Analysis, p. 22686. In the case of *Gott v. State University of New York, Buffalo* (District Court decision January 1979) the institution claimed that learning-disabled Gott did not fall within the Act's definition of "handicapped." See Part III, Definition Problems, for a discussion.

15. *Ibid.*, Emphasis added.

16. *Ibid.*

17. *Op. cit.*, #84.3(k)(1), p. 22678. Emphasis added.

18. *Op. cit.*, #84.3(k)(3), p. 22678. Emphasis added.

19. *Op. cit.*, Analysis, p. 22687.

20. Actually these regulations apply only to recipients of aid administered by HEW. According to Executive Order 11914 (4/28/76) each federal agency is to promulgate its own 504 regulations under standards issued by HEW.

21. Final Regulations, #84.3(h), p. 22678.

22. *Op. cit.*, #84.4(b)(iv), p. 22678. The phrase "unnecessarily separate or different" is in the Analysis, p. 22687. Emphasis added.

23. *Op. cit.*, #84.4(b)(2), p. 22679. Emphasis added.

24. Affirmative action involves outreach but not goals or timetables.

25. Final Regulations, #84.14(2), p. 22681. Emphasis added.

26. *Op. cit.*, #84.12(a), p. 22680. Emphasis added.

27. *Op. cit.*, p. 22677. Emphasis added.

28. *Op. cit.*, #84.22(a), p. 22681. Emphasis added.

29. *Op. cit.*, Analysis, p. 22689. Emphasis added.

30. *Op. cit.*, #84.22(b), p. 22681. Emphasis added.

31. *Op. cit.*, Analysis, p. 22689.

32. *Op. cit.*, #84.23(a), p. 22681.

33. *Op. cit.*, #84.42(b)(2), p. 22683. Emphasis added.

34. *Op. cit.*, #84.42(c), p. 22683. Emphasis added.

35. *Op. cit.*, #84.43(a), p. 22684. Emphasis added.

36. *Op. cit.*, #84.44(a), p. 22684.

37. *Ibid*. Emphasis added.

38. *Ibid*.

39. *Op. cit.*, p. 22692. Emphasis added.

40. *Op. cit.*, p. 22693.

41. *Op. cit.*, #8-.45, p. 22684.

42. *Op. cit.*, #84.47(a)(2), p. 22684.

43. *Op. cit.*, #84.47(b), p. 22684.

44. *In the Mainstream*, vol. 4, #1, Jan. - Feb., 1979; Mainstream, Inc. (Washington, D.C.); p. 2.

45. *Federal Register*, 8/14/78, Part II, p. 36034.

46. *Op. cit.*, p. 36035.

47. *Ibid*.

48. *Ibid.*, Emphasis added.

49. *Ibid.*, Emphasis added.

50. *Higher Education Daily*, 4/27/78.

51. *U.S. Law Week*, 1/9/79; 47LW 3451.

52. *Chronicle of Higher Education*, 1/22/79, p. 19.

53. *In the Mainstream*, vol. 4, #1, Jan. - Feb., 1979, p. 7.

54. *Op. cit.*, vol. 3, #4, Nov. - Dec., 1978, p. 2.

55. C. Richard Biehl, *Guide to the Section 504 Self-Evaluation for Colleges and Universities*, National Association of College and University Business Officers, Washington, D.C., January 1978; inside front cover.

II. INSTITUTIONAL RESPONSES TO THE REGULATIONS

1. Higher Education Daily, 6/6/77, p. 3
2. Final Regulations, #84.6(c)(i), p. 22679, and #84.22(a), p. 22681
3. Op. cit., #84.22(a), p. 22681.
4. Op. cit., #84.22(b). Emphasis added.
5. Ibid. Emphasis added.
6. Op. cit., Analysis, p. 22689.
7. Federal Register, 8/14/78, p. 36035.
8. Final Regulations, #84.6(c), p. 22679.

III. INSTITUTIONS' PROBLEMS WITH THE REGULATIONS

1. Final Regulations, Analysis, p. 22686.
2. Ibid.
3. Ibid.
4. Ibid.
5. Op. cit., #84.3(k)(3), p. 22678.
6. Op. cit., #84.3(j)(2)(i)(B), p. 22678. Emphasis added.
7. Op. cit., #84.3(k)(3), p. 22678.
8. Op. cit., #84.42(b)(2), p. 22683.
9. Op. cit., #84.42(b)(1), p. 22683.
10. Ibid.
11. Op. cit., #84.42(b)(2), p. 22683.
12. Op. cit., #84.3(k)(3), p. 22678.
13. Op. cit., Analysis, p. 22687.
14. Op. cit., #84.44(a), p. 22684.

15. *Ibid.*

16. *Op. cit.*, #84.10(a), 22680.

17. Southeastern Community College's three-page summary of the case, entitled "Davis vs. Southeastern Community College," p.2.

18. *Op. cit.*, p. 1.

19. Brief of the American Council on Education, *et. al.*,; in the Supreme Court of the United States, October Term, 1978; *Southeastern Community College v. Frances B. Davis*; p. 4

20. *Ibid.*

21. *Ibid.*

22. Final Regulations, #84.42(b)(2), p. 22683.

23. *Op. cit.*, Analysis, p. 22689.

24. *Op. cit.*, #84.44(d), p. 22684.

25. *Op. cit.*, Analysis, p. 22692-3.

26. *Op. cit.*, #84.10(a), p. 22680.

27. G. Richard Biehl, *op. cit.*, p. 52.

28. Humphrey-Go-Bart is Berkeley's shuttle; GUTS is Georgetown Huniversity Transportation Service.

29. Final Regulations, #84.43(b), p. 22684.

30. *In the Mainstream*, vol. 4, #1, Jan. - Feb., 1979, p. 1

31. Final Regulations, #84.44(a), p. 22684.

32. *Op. cit.*, #84.47(b), p. 22684.

33. *Op. cit.*, #84.44(a), p. 22684.

34. *Op. cit.*, Analysis, p. 22689.

35. *Op. cit.*, #84.14(a), p. 22681. Italics added.

36. *Op. cit.*, #84.13(a), p. 22680.

37. *Whitaker v. City University of New York (Brooklyn College), et. al.*. The Department of Justice has filed an amicus brief for Whitaker; ACE has filed one for CUNY, on the private right issue.

38. From an article by John Wodatch, Chief, Handicapped Discrimination Branch, OCR, in *In the Mainstream*, vol. 3, #1, Spring 1978, p. 3.

39. Comprehensive Rehabilitation Services Amendments of 1978, *op. cit.*, p. 31.

40. Editorial, Leslie Milk, *In the Mainstream*, vol. 3, #4, Nov. - Dec., 1978, p. 6.

41. Final Regulations, #84.3(j)(1), p. 22678.

42. About three dozen states plus Washington D.C. and New York City now have laws concerning discrimination against the handicapped.

43. Comprehensive Rehabilitation Service Amendments of 1978, *op. cit.*, p. 30.

44. Statement by Joseph A. Califano, Jr., *op. cit.*, p. 9.

45. Comprehensive Rehabilitatian Services Amendments of 1977, *op. cit.*, p. 28.

46. *Op. cit.*, p. 30.

47. *Ibid.*

48. Robert A. Scott, *More than Greenbacks and Red Tape: Campus Effects and Federal Compliance Requirements.* 1978. (Part of a study for Exxon Education Foundation).

IV. COMPLIANCE AND ENFORCEMENT

1. Final Regulations, #80.8(c), p. 22695.

2. *In the Mainstream*, vol. 4, #1, Jan. - Feb., 1979, p. 2

3. Final Regulations, Analysis, p. 22687.

4. Comprehensive Rehabilitation Services Amendments of 1978, *op. cit.*, p. 29.

5. *U.S. Law Week*, 1/9/79, 47LW 3451.

6. Quote from *Lloyd v. Regional Transportation Authority*, found in *Higher Education Daily*, 4/27/78. This and other 504 cases were also discussed in Part I.

7. *In the Mainstream*, vol. 3, #1, Spring 1978, p. 8.

8. Quoted in *Chronicle of Higher Education*, 4/10/78, p. 14.

9. *In the Mainstream*, vol. 3, #1, Spring, 1978, p. 3.

10. *In the Mainstream*, vol. 4, #1, Jan. - Feb., 1979, p. 7

V. JANUS

1. Herbert Kaufman, Red Tape: Its Origins, Uses and Abuses, The Brookings Institution, Washington, D.C., 1978, p. 38.

2. Quoted in Higher Education and National Affairs, Vol. XXVII, no. 26, June 30, 1978, p. 3. Emphasis added.

3. Final Regulations, #84.10(a), p. 22680.

4. Herbert Kaufman, op. cit., p. 98.

5. Carl Kaysen, Government and Higher Education: The Significant Policy Issues in Their Context. Paper for the Sloan Commission on Government and Higher Education, August 1978, draft, p. 24.

6. Op. cit., p. 23.

GLOSSARY

AAAS	American Association for the Advancement of Science
AACRAO	American Association of Collegiate Registrars and Admissions Officers
ANSI	American National Standards Institute
APPA	Association of Physical Plant Administrators of Universities and Colleges
BEH	Bureau of Education for the Handicapped
B & G	Buildings and Grounds
Coalition	The American Coalition of Citizens with Disabilities
Compliance Board	Architectural and Transportation Barriers Compliance Board
C & E	Compliance and Enforcement
DOL	Department of Labor
DSS	Disabled Student Services
DVR	An abbreviation referring to a state's vocational rehabilitation department or agency
FY	Fiscal Year
GAO	General Accounting Office
HEATH	Higher Education and the Handicapped project
HEGIS	Higher Education General Information Survey
HEW	Department of Health, Education and Welfare
NACUBO	National Association of College and University Business Officers
NAICU	National Association of Independent Colleges and Universities
NCES	National Center for Education Statistics
NFB	National Federation for the Blind
OCR	Office for Civil Rights
OE	U.S. Office of Education
OFCCP	Office of Federal Contract Compliance Programs
Paraplegic	One who is paralyzed in both lower limbs
Quadriplegic	One who is paralyzed in, or has severely limited use of three or four limbs
RSA	Rehabilitation Services Administration
T/A	Technical Assistance

APPENDICES

federal register

WEDNESDAY, MAY 4, 1977

PART IV

THE NATIONAL ARCHIVES OF THE UNITED STATES
1934

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of the Secretary

NONDISCRIMINATION ON BASIS OF HANDICAP

Programs and Activities Receiving or Benefiting from Federal Financial Assistance

Title 45—Public Welfare

SUBTITLE A—DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, GENERAL ADMINISTRATION

PART 84—NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE

AGENCY: Department of Health, Education, and Welfare.

ACTION: Final rule.

SUMMARY: This regulation implements section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, with regard to federal financial assistance administered by the Department of Health, Education, and Welfare. Section 504 provides that "no otherwise qualified handicapped individual * * * shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." The regulation, which applies to all recipients of federal assistance from HEW, is intended to ensure that their federally assisted programs and activities are operated without discrimination on the basis of handicap. The regulation defines and forbids acts of discrimination against qualified handicapped persons in employment and in the operation of programs and activities receiving assistance from the Department. As employers, recipients must make reasonable accommodation to the handicaps of applicants and employees unless the accommodation would cause the employer undue hardship. As providers of services, recipients are required to make programs operated in existing facilities accessible to handicapped persons, to ensure that new facilities are constructed so as to be readily accessible to handicapped persons, and to operate their programs in a nondiscriminatory manner.

EFFECTIVE DATE: June 3, 1977.

FOR FURTHER INFORMATION CONTACT:

John Wodatch, Director, Office of New Programs, Office for Civil Rights, Department of Health, Education, and Welfare, Washington, D.C. 20201, 202-245-1821.

SUPPLEMENTARY INFORMATION:

BACKGROUND

As part of the Rehabilitation Act of 1973 (Public Law 93-112) Congress enacted section 504, which provides that "no otherwise qualified handicapped individual in the United States, as defined in section 7(6), shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." In the same statute, Congress defined the term "handicapped individual" solely with relationship to employment; section 7(6) of the 1973 Act defined the term "handicapped individual" as "any individual who (a) has a physical or mental disability which for such individual constitutes or results in substantial handicap to employment and (b) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services * * *." However, the following year, in section 111(a) of the Rehabilitation Act Amendments of 1974 (Public Law 93-516), Congress amended the definition of "handicapped individual" for purposes of section 504 and the other provisions of titles IV and V of the Rehabilitation Act so that the definition is no longer limited to the dimension of employability. For purposes of section 504 of the Act, a "handicapped individual" is defined as "any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment." With this amended definition, it became clear that section 504 was intended to forbid discrimination against all handicapped individuals, regardless of their need for or ability to benefit from vocational rehabilitation services.

Section 504 thus represents the first Federal civil rights law protecting the rights of handicapped persons and reflects a national commitment to end discrimination on the basis of handicap. The language of section 504 is almost identical to the comparable nondiscrimination provisions of title VI of the Civil Rights Act of 1964 and title IX of the Education Amendments of 1972 (applying to racial discrimination and to discrimination in education on the basis of sex). It establishes a mandate to end discrimination and to bring handicapped persons into the mainstream of American life. The Secretary intends vigorously to implement and enforce that mandate.

THE PROBLEM OF DISCRIMINATION

From the outset, the Department has recognized that the problem of ending discrimination on the basis of handicap presents considerations that are extremely complex. The diversity of types of handicaps, as well as the wide variety of settings in which programs financed by the Department are offered, make the task of prescribing general rules of nondiscriminatory treatment a difficult one.

There is overwhelming evidence that in the past many handicapped persons have been excluded from programs entirely or denied equal treatment, simply because they are handicapped. But eliminating such gross exclusions and denials of equal treatment is not sufficient to assure genuine equal opportunity. In drafting a regulation to prohibit exclusion and discrimination, it became clear that different or special treatment of handicapped persons, because of their handicaps, may be necessary in a number of contexts in order to ensure equal opportunity. Thus, for example, it is meaningless to "admit" a handicapped person in a wheelchair to a program if the program is offered only on the third floor of a walk-up building. Nor is one providing equal educational opportunity to a deaf child by admitting him or her to a classroom but providing no means for the child to understand the teacher or receive instruction.

These problems have been compounded by the fact that ending discriminatory practices and providing equal access to programs may involve major burdens on some recipients. Those burdens and costs, to be sure, provide no basis for exemption from section 504 or this regulation: Congress' mandate to end discrimination is clear. But it is also clear that factors of burden and cost had to be taken into account in the regulation in prescribing the actions necessary to end discrimination and to bring handicapped persons into full participation in federally financed programs and activities.

The very general language of section 504 itself and the scant legislative history surrounding its enactment provide little guidance as to how these complex issues should be resolved. The rulemaking process in which the Department has engaged has, however, provided a basis for an initial resolution of those issues. The Secretary believes the resulting regulation offers genuine promise of providing an effective and workable program for ending discrimination against handicapped persons.

RULEMAKING HISTORY

On May 17, 1976, the Department published a Notice of Intent to Issue Proposed Rules, seeking public comment on fifteen identified critical issues. 41 FR 20296. A draft proposed rule was attached to the Notice of Intent, as was a statement of the estimated economic and inflationary impact of the draft proposal, prepared in accordance with the requirements of Executive Order 11821.

Over three hundred written comments were received in response to the Notice of Intent. The written comments were supplemented by a series of ten meetings conducted by the Office for Civil Rights at various locations across the country.

On July 16, 1976, the Department published a Notice of Proposed Rulemaking analyzing comments received on the critical issues identified in the Notice of Intent and setting forth a revised proposed regulation for public comment. 41 FR 29548. The initial 60-day comment period was extended in response to numerous requests until October 14, 1976. Additional comments received since that date have also been considered to the extent feasible. A total of more than 700 comments were received in response to the July 16 Notice of Proposed Rulemaking; they have been analyzed along with approximately 150 comments sent in response to May 17 Notice that were received too late to be analyzed during the first comment period. Finally, an additional twenty-two public meetings were held after publication of the July 16 Notice, again designed to inform interested persons and organizations of the proposed regulation and to solicit their comments and recommendations. Transcripts of all these meetings were made and analyzed along with the written comments. Copies of these transcripts, as well as the written comments, are available for public inspection in Room 5400, 330 Independence Avenue, S.W., Washington, D.C. 20201.

The Secretary believes that both the written comments and the views expressed at the public meetings have illuminated the complex issues involved in implementing section 504 in an effective and workable fashion. The Secretary's response to the comments of interested parties, and the explanation for changes in the proposed regulation, are set forth in the section-by-section analysis of each subpart of the regulation, which appears as Appendix A to the regulation. As that analysis explains, a number of provisions in the proposed regulation have been eliminated as duplicative or unnecessary; others have been shortened or clarified. The goal throughout has been to design a regulation that preserves the essential elements of a strong and effective program for ending discrimination, while avoiding the imposition of unnecessary or counterproductive administrative obligations on recipients.

OVERVIEW OF REGULATION

The regulation is divided into seven subparts. Subpart A (General Provisions) defines the important terms that are used throughout the regulation and states in general terms the discriminatory acts that are prohibited. It also sets forth what the Secretary believes is a simple, workable system of administration: assurances of compliance, self-evaluation by recipients, establishment of grievance procedures, and notification of employees and beneficiaries of the recipient's policy of nondiscrimination on the basis of handicap. The regulation covers all types of physical and mental impairments, including drug addiction and alcoholism.

Subpart B, dealing with employment practices, bars discrimination by recipients of HEW assistance in recruitment, hiring, compensation, job assignment and classification, and fringe benefits. It also requires employers to make reasonable accommodation to qualified handicapped applicants or employees unless it can be demonstrated that the accommodation would impose an undue hardship on the employer.

Subpart C sets forth the central requirement of the regulation—program accessibility. All new facilities are required to be constructed so as to be readily accessible to and usable by handicapped persons. Every existing facility need not be made physically accessible, but all recipients must ensure that programs conducted in those facilities are made accessible. While flexibility is allowed in choosing methods that in fact make programs in existing facilities accessible, structural changes in such facilities must be undertaken if no other means of assuring program accessibility is available.

Subparts A, B, and C of the regulation, as well as subpart G—which incorporates by reference the Department's procedures under title VI of the Civil Rights Act of 1964—apply to all recipients of financial assistance from the Department. The remaining subparts of the regulation contain more specific requirements applicable to three major classes of recipients.

Subpart D is concerned with preschool, elementary, and secondary education. Its provisions have been closely coordinated with those of the Education for All Handicapped Children Act of 1975 (Pub. L. 94-142). They require, basically, that recipients operating public education programs provide a free appropriate education to each qualified handicapped child in the most normal setting appropriate. The regulation also sets forth evaluation requirements designed to ensure the proper classification and placement of handicapped children, and due process procedures for resolving disputes over placement of students. While the Department does not intend to review individual placement decisions, it does intend to ensure that testing and evaluation procedures required by the regulation are carried out, and that school systems provide an adequate opportunity for parents to challenge and seek review of these critical decisions. And the Department will place a high priority on pursuing cases in which a pattern or practice of discriminatory placements may be involved.

Subpart E deals with postsecondary education. It proscribes discrimination against handicapped persons in recruitment, admission and treatment after admission. Colleges and universities are required to make reasonable adjustments to permit handicapped persons to fulfill academic requirements, and to ensure that they are not effectively excluded from programs because of the absence of auxiliary aids. Groups of colleges may not establish consortia exclusively for handicapped students.

Finally, Subpart F deals with health, welfare and other social service programs. It forbids discrimination in providing such services and requires larger recipients to provide auxiliary aids to handicapped individuals where necessary. Specific provisions require hospitals not to discriminate against addicts or alcoholics who need medical services and to establish emergency room procedures for communication with persons with impaired hearing. Under Subpart C, health and social service providers may satisfy their program accessibility obligations with respect to existing facilities by arranging to meet beneficiaries in accessible locations. In addition, small providers may refer patients or other beneficiaries to accessible providers as a "last resort" alternative to making significant structural changes.

EXECUTIVE ORDER 11914

Under Executive Order 11914 (41 FR 17871, April 28, 1976), the Department is required to issue general standards for other departments and agencies of the Federal government to follow in promulgating regulations implementing Section 504. This responsibility will be fulfilled promptly and independently from this regulation. The Department does, however, expect to incorporate the definition of handicapped person adopted in § 84.3(j) of this regulation in the standards for determining what persons are covered by the Act. The Secretary also anticipates that the relevant provisions of Subparts A, B and C of the regulation will be the basis for guidelines, pursuant to the Executive Order, as to what are discriminatory practices.

ECONOMIC IMPACT

The Department has previously certified, in issuing the Notice of Intent and the Notice of Proposed Rulemaking, that the economic and inflationary impact of the proposed regulation had been carefully evaluated in accordance with OMB Circular A-107. That analysis, which was printed at 41 FR 20312 (May 17, 1976), has been revised and updated, and is available on request.

SECTION-BY-SECTION ANALYSIS OF REGULATION

Appended to the final regulation is a section-by-section analysis of the regulation, which describes the basis and purpose of each section, discusses significant comments, and explains the basis for any changes made from the proposed regulation published in July 1976.

In consideration of the foregoing, Part 84, to read as set forth below, is hereby ordered to be added to Title 45 of the Code of Federal Regulations.

Dated: April 28, 1977.

JOSEPH A. CALIFANO, Jr.,
Secretary, Department of
Health, Education, and Welfare.

Subpart A—General Provisions

Sec.
84.1 Purpose.
84.2 Application.
84.3 Definitions.
84.4 Discrimination prohibited.
84.5 Assurances required.
84.6 Remedial action, voluntary action, and self-evaluation.
84.7 Designation of responsible employee and adoption of grievance procedures.
84.8 Notice.
84.9 Administrative requirements for small recipients.
84.10 Effect of state or local law or other requirements and effect of employment opportunities.

Subpart B—Employment Practices

84.11 Discrimination prohibited.
84.12 Reasonable accommodation.
84.13 Employment criteria.
84.14 Preemployment inquiries.
84.15–84.20 [Reserved]

Subpart C—Program Accessibility

84.21 Discrimination prohibited.
84.22 Existing facilities.
84.23 New construction.
84.24–84.30 [Reserved]

Subpart D—Preschool, Elementary, and Secondary Education

84.31 Application of this subpart.
84.32 Location and notification.
84.33 Free appropriate public education.
84.34 Educational setting.
84.35 Evaluation and placement.

Sec.
84.36 Procedural safeguards.
84.37 Nonacademic services.
84.38 Preschool and adult education programs.
84.39 Private education programs.
84.40 [Reserved]

Subpart E—Postsecondary Education

84.41 Application of this subpart.
84.42 Admissions and recruitment.
84.43 Treatment of students; general.
84.44 Academic adjustments.
84.45 Housing.
84.46 Financial and employment assistance to students.
84.47 Nonacademic services.
84.48-84.50 [Reserved]

Subpart F—Health, Welfare, and Social Services

84.51 Application of this subpart.
84.52 Health, welfare, and other social services.
84.53 Drug and alcohol addicts.
84.54 Education of institutionalized persons.
84.55-84.60 [Reserved]

Subpart G—Procedures

84.61 Procedures.
84.62-99 [Reserved]

APPENDIX A—ANALYSIS OF FINAL REGULATION

AUTHORITY: Sec. 504, Rehabilitation Act of 1973, Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794); sec. 111(a), Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 88 Stat. 1619 (29 U.S.C. 706); sec. 606, Education of the Handicapped Act (20 U.S.C. 1405), as amended by Pub. L. 94-142, 89 Stat. 795; sec. 321, Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970, 84 Stat. 182 (42 U.S.C. 4581), as amended; sec. 407, Drug Abuse Office and Treatment Act of 1972, 86 Stat. 78 (21 U.S.C. 1174), as amended.

Subpart A—General Provisions

§ 84.1 Purpose.

The purpose of this part is to effectuate section 504 of the Rehabilitation Act of 1973, which is designed to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance.

§ 84.2 Application.

This part applies to each recipient of Federal financial assistance from the Department of Health, Education, and Welfare and to each program or activity that receives or benefits from such assistance.

§ 84.3 Definitions.

As used in this part, the term:

(a) "The Act" means the Rehabilitation Act of 1973, Pub. L. 93-112, as amended by the Rehabilitation Act Amendments of 1974, Public Law 93-516, 29 U.S.C. 794.

(b) "Section 504" means section 504 of the Act.

(c) "Education of the Handicapped Act" means that statute as amended by the Education for all Handicapped Children Act of 1975, Pub. L. 94-142, 20 U.S.C. 1401 et seq.

(d) "Department" means the Department of Health, Education, and Welfare.

(e) "Director" means the Director of the Office for Civil Rights of the Department.

(f) "Recipient" means any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

(g) "Applicant for assistance" means one who submits an application, request, or plan required to be approved by a Department official or by a recipient as a condition to becoming a recipient.

(h) "Federal financial assistance" means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of Federal personnel; or

(3) Real and personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

(i) "Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property.

(j) "Handicapped person." (1) "Handicapped persons" means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

(2) As used in paragraph (j)(1) of this section, the phrase:

(i) "Physical or mental impairment" means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(iii) "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(iv) "Is regarded as having an impairment" means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.

(k) "Qualified handicapped person" means:

(1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question;

(2) With respect to public preschool, elementary, secondary, or adult educational services, a handicapped person (i) of an age during which nonhandicapped persons are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons, or (iii) to whom a state is required to provide a free appropriate public education under § 612 of the Education of the Handicapped Act; and

(3) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity;

(4) With respect to other services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

(l) "Handicap" means any condition or characteristic that renders a person a handicapped person as defined in paragraph (j) of this section.

§ 84.4 Discrimination prohibited.

(a) *General.* No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance.

(b) *Discriminatory actions prohibited.* (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipients program;

(vi) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

(2) For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

(3) Despite the existence of separate or different programs or activities provided in accordance with this part, a recipient may not deny a qualified handicapped person the opportunity to participate in such programs or activities that are not separate or different.

(4) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.

(5) In determining the site or location of a facility, an applicant for assistance or a recipient may not make selections (i) that have the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives or benefits from Federal financial assistance or (ii) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped persons.

(6) As used in this section, the aid, benefit, or service provided under a program or activity receiving or benefiting from Federal financial assistance includes any aid, benefit, or service provided in or through a facility that has been constructed, expanded, altered, leased or rented, or otherwise acquired, in whole or in part, with Federal financial assistance.

(c) *Programs limited by Federal law.* The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by Federal statute or executive order to a different class of handicapped persons is not prohibited by this part.

§ 84.5 Assurances required.

(a) *Assurances.* An applicant for Federal financial assistance for a program or activity to which this part applies shall submit an assurance, on a form specified by the Director, that the program will be operated in compliance with this part. An applicant may incorporate these assurances by reference in subsequent applications to the Department.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended in the form of real property or to provide real property or structures on the property, the assurance will obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used for the purpose for which Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) In the case of Federal financial assistance extended to provide personal property, the assurance will obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases the assurance will obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Covenants.* (1) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the instrument effecting or recording this transfer shall contain a covenant running with the land to assure nondiscrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) Where no transfer of property is involved but property is purchased or improved with Federal financial assistance, the recipient shall agree to include the covenant described in paragraph (b)(2) of this section in the instrument effecting or recording any subsequent transfer of the property.

(3) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the covenant shall also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant. If a transferee of real property proposes to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing, facilities on the property for the purposes for which the property was transferred, the Director may, upon request of the transferee and if necessary to accomplish such financing and upon such conditions as he or she deems appropriate, agree to forbear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective.

§ 84.6 Remedial action, voluntary action, and self-evaluation.

(a) *Remedial action.* (1) If the Director finds that a recipient has discriminated against persons on the basis of handicap in violation of section 504 or this part, the recipient shall take such remedial action as the Director deems necessary to overcome the effects of the discrimination.

(2) Where a recipient is found to have discriminated against persons on the basis of handicap in violation of section 504 or this part and where another recipient exercises control over the recipient that has discriminated, the Director, where appropriate, may require either or both recipients to take remedial action.

(3) The Director may, where necessary to overcome the effects of discrimination in violation of section 504 or this part, require a recipient to take remedial action (i) with respect to handicapped persons who are no longer participants in the recipient's program but who were participants in the program when such discrimination occurred or (ii) with respect to handicapped persons who would have been participants in the program had the discrimination not occurred.

(b) *Voluntary action.* A recipient may take steps, in addition to any action that is required by this part, to overcome the effects of conditions that resulted in limited participation in the recipient's program or activity by qualified handicapped persons.

(c) *Self-evaluation.* (1) A recipient shall, within one year of the effective date of this part:

(i) Evaluate, with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons, its current policies and practices and the effects thereof that do not or may not meet the requirements of this part;

(ii) Modify, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, any policies and practices that do not meet the requirements of this part; and

(iii) Take, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, appropriate remedial steps to eliminate the effects of any discrimination that resulted from adherence to these policies and practices.

(2) A recipient that employs fifteen or more persons shall, for at least three years following completion of the evaluation required under paragraph (c)(1) of this section, maintain on file, make available for public inspection, and provide to the Director upon request: (i) a list of the interested persons consulted, (ii) a description of areas examined and any problems identified, and (iii) a description of any modifications made and of any remedial steps taken.

§ 84.7 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* A recipient that employs fifteen or more persons shall designate at least one person to coordinate its efforts to comply with this part.

(b) *Adoption of grievance procedures.* A recipient that employs fifteen or more persons shall adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by this part. Such procedures need not be established with respect to complaints from applicants for employment or from applicants for admission to postsecondary educational institutions.

§ 84.8 Notice.

(a) A recipient that employs fifteen or more persons shall take appropriate initial and continuing steps to notify participants, beneficiaries, applicants, and employees, including those with impaired vision or hearing, and unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of handicap in violation of section 504 and this part. The notification shall state, where appropriate, that the recipient does not discriminate in admission or access to, or treatment or employment in, its programs and activities. The notification shall also include an identification of the responsible employee designated pursuant to § 84.7(a). A recipient shall make the initial notification required by this paragraph within 90 days of the effective date of this part. Methods of initial and continuing notification may include the posting of notices, publication in newspapers and magazines, placement of notices in recipients' publication, and distribution of memoranda or other written communications.

(b) If a recipient publishes or uses recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants, or employees, it shall include in those materials or publications a statement of the policy described in paragraph (a) of this section. A recipient may meet the requirement of this paragraph either by including appropriate inserts in existing materials and publications or by revising and reprinting the materials and publications.

§ 84.9 Administrative requirements for small recipients.

The Director may require any recipient with fewer than fifteen employees, or any class of such recipients, to comply with §§ 84.7 and 84.8, in whole or in part, when the Director finds a violation of this part or finds that such compliance will not significantly impair the ability of the recipient or class of recipients to provide benefits or services.

§ 84.10 Effect of state or local law or other requirements and effect of employment opportunities.

(a) The obligation to comply with this part is not obviated or alleviated by the existence of any state or local law or other requirement that, on the basis of handicap, imposes prohibitions or limits upon the eligibility of qualified handicapped persons to receive services or to practice any occupation or profession.

(b) The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for handicapped persons than for nonhandicapped persons.

Subpart B—Employment Practices

§ 84.11 Discrimination prohibited.

(a) *General.* (1) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity to which this part applies.

(2) A recipient that receives assistance under the Education of the Handicapped Act shall take positive steps to employ and advance in employment qualified handicapped persons in programs assisted under that Act.

(3) A recipient shall make all decisions concerning employment under any program or activity to which this part applies in a manner which ensures that discrimination on the basis of handicap does not occur and may not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap.

(4) A recipient may not participate in a contractual or other relationship that has the effect of subjecting qualified handicapped applicants or employees to discrimination prohibited by this subpart. The relationships referred to in this subparagraph include relationships with employment and referral agencies, with labor unions, with organizations providing or administering fringe benefits to employees of the recipient, and with organizations providing training and apprenticeship programs.

(b) *Specific activities.* The provisions of this subpart apply to:

(1) Recruitment, advertising, and the processing of applications for employment;

(2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation and changes in compensation;

(4) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(5) Leaves of absence, sick leave, or any other leave;

(6) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(7) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;

(8) Employer sponsored activities, including social or recreational programs; and

(9) Any other term, condition, or privilege of employment.

(c) A recipient's obligation to comply with this subpart is not affected by any inconsistent term of any collective bargaining agreement to which it is a party.

§ 84.12 Reasonable accommodation.

(a) A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(b) Reasonable accommodation may include: (1) making facilities used by employees readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.

(c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of a recipient's program, factors to be considered include:

(1) The overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget;

(2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and

(3) The nature and cost of the accommodation needed.

(d) A recipient may not deny any employment opportunity to a qualified handicapped employee or applicant if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.

§ 84.13 Employment criteria.

(a) A recipient may not make use of any employment test or other selection criterion that screens out or tends to screen out handicapped persons or any class of handicapped persons unless: (1) the test score or other selection criterion, as used by the recipient, is shown to be job-related for the position in question, and (2) alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Director to be available.

(b) A recipient shall select and administer tests concerning employment so as best to ensure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's or employee's job skills, aptitude, or whatever other factor the test purports to measure, rather than reflecting the applicant's or employee's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

§ 84.14 *Preemployment inquiries.*

(a) Except as provided in paragraphs (b) and (c) of this section, a recipient may not conduct a preemployment medical examination or may not make preemployment inquiry of an applicant as to whether the applicant is a handicapped person or as to the nature or severity of a handicap. A recipient may, however, make preemployment inquiry into an applicant's ability to perform job-related functions.

(b) When a recipient is taking remedial action to correct the effects of past discrimination pursuant to § 84.6(a), when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to § 84.6(b), or when a recipient is taking affirmative action pursuant to section 503 of the Act, the recipient may invite applicants for employment to indicate whether and to what extent they are handicapped, *Provided*, That:

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary or affirmative action efforts; and

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential as provided in paragraph (d) of this section, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with this part.

(c) Nothing in this section shall prohibit a recipient from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty, *Provided*, That: (1) All entering employees are subjected to such an examination regardless of handicap, and (2) the results of such an examination are used only in accordance with the requirements of this part.

(d) Information obtained in accordance with this section as to the medical condition or history of the applicant shall be collected and maintained on separate forms that shall be accorded confidentiality as medical records, except that:

(1) Supervisors and managers may be informed regarding restrictions on the work or duties of handicapped persons and regarding necessary accommodations;

(2) First aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment; and

(3) Government officials investigating compliance with the Act shall be provided relevant information upon request.

§§ 84.15—84.20 [Reserved]

Subpart C—*Program Accessibility*

§ 84.21 *Discrimination prohibited.*

No qualified handicapped person shall, because a recipient's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which this part applies.

§ 84.22 *Existing facilities.*

(a) *Program accessibility.* A recipient shall operate each program or activity to which this part applies so that the program or activity, when viewed in its entirety, is readily accessible to handicapped persons. This paragraph does not require a recipient to make each of its existing facilities or every part of a facility accessible to and usable by handicapped persons.

(b) *Methods.* A recipient may comply with the requirement of paragraph (a) of this section through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of health, welfare, or other social services at alternate accessible sites, alteration of existing facilities and construction of new facilities in conformance with the requirements of § 84.23, or any other methods that result in making its program or activity accessible to handicapped persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with paragraph (a) of this section. In choosing among available methods for meeting the requirement of paragraph (a) of this section, a recipient shall give priority to those methods that offer programs and activities to handicapped persons in the most integrated setting appropriate.

(c) *Small health, welfare, or other social service providers.* If a recipient with fewer than fifteen employees that provides health, welfare, or other social services finds, after consultation with a handicapped person seeking its services, that there is no method of complying with paragraph (a) of this section other than making a significant alteration in its existing facilities, the recipient may, as an alternative, refer the handicapped person to other providers of those services that are accessible.

(d) *Time period.* A recipient shall comply with the requirement of paragraph (a) of this section within sixty days of the effective date of this part except that where structural changes in facilities are necessary, such changes shall be made within three years of the effective date of this part, but in any event as expeditiously as possible.

(e) *Transition plan.* In the event that structural changes to facilities are necessary to meet the requirement of paragraph (a) of this section, a recipient shall develop, within six months of the effective date of this part, a transition plan setting forth the steps necessary to complete such changes. The plan shall be developed with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons. A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum:

(1) Identify physical obstacles in the recipient's facilities that limit the accessibility of its program or activity to handicapped persons;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve full program accessibility and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the person responsible for implementation of the plan.

(f) *Notice.* The recipient shall adopt and implement procedures to ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of services, activities, and facilities that are accessible to and usable by handicapped persons.

§ 84.23 *New construction.*

(a) *Design and construction.* Each facility or part of a facility constructed by, on behalf of, or for the use of a recipient shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by handicapped persons, if the construction was commenced after the effective date of this part.

(b) *Alteration.* Each facility or part of a facility which is altered by, on behalf of, or for the use of a recipient after the effective date of this part in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by handicapped persons.

(c) *American National Standards Institute accessibility standards.* Design, construction, or alteration of facilities in conformance with the "American National Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped," published by the American National Standards Institute, Inc. (ANSI A117.1-1961 (R1971)),[1] which is incorporated by reference in this part, shall constitute compliance with paragraphs (a) and (b) of this section. Departures from particular requirements of those standards by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided.

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[1] Copies obtainable from American National Standards Institute, Inc., 1430 Broadway, New York, N.Y. 10018.

§§ 84.24–84.30 [Reserved]

Subpart D—Preschool, Elementary, and Secondary Education

§ 84.31 Application of this subpart.

Subpart D applies to preschool, elementary, secondary, and adult education programs and activities that receive or benefit from federal financial assistance and to recipients that operate, or that receive or benefit from federal financial assistance for the operation of, such programs or activities.

§ 84.32 Location and notification.

A recipient that operates a public elementary or secondary education program shall annually:

(a) Undertake to identify and locate every qualified handicapped person residing in the recipient's jurisdiction who is not receiving a public education; and

(b) Take appropriate steps to notify handicapped persons and their parents or guardians of the recipient's duty under this subpart.

§ 84.33 Free appropriate public education.

(a) *General.* A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

(b) *Appropriate education.* (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 84.34, 84.35, and 84.36.

(2) Implementation of an individualized education program developed in accordance with the Education of the the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i) of this section.

(3) A recipient may place a handicapped person in or refer such person to a program other than the one that it operates as its means of carrying out the requirements of this subpart. If so, the recipient remains responsible for ensuring that the requirements of this subpart are met with respect to any handicapped person so placed or referred.

(c) *Free education*—(1) *General.* For the purpose of this section, the provision of a free education is the provision of educational and related services without cost to the handicapped person or to his or her parents or guardian, except for those fees that are imposed on nonhandicapped persons or their parents or guardian. It may consist either of the provision of free services or, if a recipient places a handicapped person in or refers such person to a program not operated by the recipient as its means of carrying out the requirements of this subpart, of payment for the costs of the program. Funds available from any public or private agency may be used to meet the requirements of this subpart. Nothing in this section shall be construed to relieve an insurer or similar third party from an otherwise valid obligation to provide or pay for services provided to a handicapped person.

(2) *Transportation.* If a recipient places a handicapped person in or refers such person to a program not operated by the recipient as its means of carrying out the requirements of this subpart, the recipient shall ensure that adequate transportation to and from the program is provided at no greater cost than would be incurred by the person or his or her parents or guardian if the person were placed in the program operated by the recipient.

(3) *Residential placement.* If placement in a public or private residential program is necessary to provide a free appropriate public education to a handicapped person because of his or her handicap, the program, including nonmedical care and room and board, shall be provided at no cost to the person or his or her parents or guardian.

(4) *Placement of handicapped persons by parents.* If a recipient has made available, in conformance with the requirements of this section and § 84.34, a free appropriate public education to a handicapped person and the person's parents or guardian choose to place the person in a private school, the recipient is not required to pay for the person's education in the private school. Disagreements between a parent or guardian and a recipient regarding whether the recipient has made such a program available or otherwise regarding the question of financial responsibility are subject to the due process procedures of § 84.36.

(d) *Compliance.* A recipient may not exclude any qualified handicapped person from a public elementary or secondary education after the effective date of this part. A recipient that is not, on the effective date of this regulation, in full compliance with the other requirements of the preceding paragraphs of this section shall meet such requirements at the earliest practicable time and in no event later than September 1, 1978.

§ 84.34 Educational setting.

(a) *Academic setting.* A recipient to which this subpart applies shall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall place a handicapped person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Whenever a recipient places a person in a setting other than the regular educational environment pursuant to this paragraph, it shall take into account the proximity of the alternate setting to the person's home.

(b) *Nonacademic settings.* In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 84.37(a)(2), a recipient shall ensure that handicapped persons participate with nonhandicapped persons in such activities and services to the maximum extent appropriate to the needs of the handicapped person in question.

(c) *Comparable facilities.* If a recipient, in compliance with paragraph (a) of this section, operates a facility that is identifiable as being for handicapped persons, the recipient shall ensure that the facility and the services and activities provided therein are comparable to the other facilities, services, and activities of the recipient.

§ 84.35 Evaluation and placement.

(a) *Preplacement evaluation.* A recipient that operates a public elementary or secondary education program shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in a regular or special education program and any subsequent significant change in placement.

(b) *Evaluation procedures.* A recipient to which this subpart applies shall establish standards and procedures for the evaluation and placement of persons who, because of handicap, need or are believed to need special education or related services which ensure that:

(1) Tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer;

(2) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and

(3) Tests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

(c) *Placement procedures.* In interpreting evaluation data and in making placement decisions, a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensure that the placement decision is made in conformity with § 84.34.

(d) *Reevaluation.* A recipient to which this section applies shall establish procedures, in accordance with paragraph (b) of this section, for periodic reevaluation of students who have been provided special education and related services. A reevaluation procedure consistent with the Education for the Handicapped Act is one means of meeting this requirement.

§ 84.36 Procedural safeguards.

A recipient that operates a public elementary or secondary education program shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

§ 84.37 Nonacademic services.

(a) *General.* (1) A recipient to which this subpart applies shall provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities.

(2) Nonacademic and extracurricular services and activities may include counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipient, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the recipient and assistance in making available outside employment.

(b) *Counseling services.* A recipient to which this subpart applies that provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities.

(c) *Physical education and athletics.* (1) In providing physical education courses and athletics and similar programs and activities to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors interscholastic, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different from those offered to nonhandicapped students only if separation or differentiation is consistent with the requirements of § 84.34 and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

§ 84.38 Preschool and adult education programs.

A recipient to which this subpart applies that operates a preschool education or day care program or activity or an adult education program or activity may not, on the basis of handicap, exclude qualified handicapped persons from the program or activity and shall take into account the needs of such persons in determining the aid, benefits, or services to be provided under the program or activity.

§ 84.39 Private education programs.

(a) A recipient that operates a private elementary or secondary education program may not, on the basis of handicap, exclude a qualified handicapped person from such program if the person can, with minor adjustments, be provided an appropriate education, as defined in § 84.33(b)(1), within the recipient's program.

(b) A recipient to which this section applies may not charge more for the provision of an appropriate education to handicapped persons than to nonhandicapped persons except to the extent that any additional charge is justified by a substantial increase in cost to the recipient.

(c) A recipient to which this section applies that operates special education programs shall operate such programs in accordance with the provisions of §§ 84.35 and 84.36. Each recipient to which this section applies is subject to the provisions of §§ 84.34, 84.37, and 84.38.

§ 84.40 [Reserved]

Subpart E—Postsecondary Education

§ 84.41 Application of this subpart.

Subpart E applies to postsecondary education programs and activities, including postsecondary vocational education programs and activities, that receive or benefit from federal financial assistance and to recipients that operate, or that receive or benefit from federal financial assistance for the operation of, such programs or activities.

§ 84.42 Admissions and recruitment.

(a) *General.* Qualified handicapped persons may not, on the basis of handicap, be denied admission or be subjected to discrimination in admission or recruitment by a recipient to which this subpart applies.

(b) *Admissions.* In administering its admission policies, a recipient to which this subpart applies:

(1) May not apply limitations upon the number or proportion of handicapped persons who may be admitted;

(2) May not make use of any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons or any class of handicapped persons unless (i) the test or criterion, as used by the recipient, has been validated as a predictor of success in the education program or activity in question and (ii) alternate tests or criteria that have a less disproportionate, adverse effect are not shown by the Director to be available;

(3) Shall assure itself that (i) admissions tests are selected and administered so as best to ensure that, when a test is administered to an applicant who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the applicant's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure); (ii) admissions tests that are designed for persons with impaired sensory, manual, or speaking skills are offered as often and in as timely a manner as are other admissions tests; and (iii) admissions tests are administered in facilities that, on the whole, are accessible to handicapped persons; and

(4) Except as provided in paragraph (c) of this section, may not make preadmission inquiry as to whether an applicant for admission is a handicapped person but, after admission, may make inquiries on a confidential basis as to handicaps that may require accommodation.

(c) *Preadmission inquiry exception.* When a recipient is taking remedial action to correct the effects of past discrimination pursuant to § 84.6(a) or when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to § 84.6(b), the recipient may invite applicants for admission to indicate whether and to what extent they are handicapped, *Provided*, That:

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary action efforts; and

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential, that refusal to provide it will not subject the applicant to any adverse treatment, and that it will be used only in accordance with this part.

(d) *Validity studies.* For the purpose of paragraph (b)(2) of this section, a recipient may base prediction equations on first year grades, but shall conduct periodic validity studies against the criterion of overall success in the education program or activity in question in order to monitor the general validity of the test scores.

§ 84.43 Treatment of students; general.

(a) No qualified handicapped student shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, research, occupational training, housing, health insurance, counseling, financial aid, physical education, athletics, recreation, transportation, other extracurricular, or other postsecondary education program or activity to which this subpart applies.

(b) A recipient to which this subpart applies that considers participation by students in education programs or activities not operated wholly by the recipient as part of, or equivalent to, an education program or activity operated by the recipient shall assure itself that the other education program or activity, as a whole, provides an equal opportunity for the participation of qualified handicapped persons.

(c) A recipient to which this subpart applies may not, on the basis of handicap, exclude any qualified handicapped student from any course, course of study, or other part of its education program or activity.

(d) A recipient to which this subpart applies shall operate its programs and activities in the most integrated setting appropriate.

§ 84.44 Academic adjustments.

(a) *Academic requirements.* A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the program of instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.

(b) *Other rules.* A recipient to which this subpart applies may not impose upon handicapped students other rules, such as the prohibition of tape recorders in classrooms or of dog guides in campus buildings, that have the effect of limiting the participation of handicapped students in the recipient's education program or activity.

(c) *Course examinations.* In its course examinations or other procedures for evaluating students' academic achievement in its program, a recipient to which this subpart applies shall provide such methods for evaluating the achievement of students who have a handicap that impairs sensory, manual, or speaking skills as will best ensure that the results of the evaluation represents the student's achievement in the course, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where such skills are the factors that the test purports to measure).

(d) *Auxiliary aids.* (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

(2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

§ 84.45 Housing.

(a) *Housing provided by the recipient.* A recipient that provides housing to its nonhandicapped students shall provide comparable, convenient, and accessible housing to handicapped students at the same cost as to others. At the end of the transition period provided for in Subpart C, such housing shall be available in sufficient quantity and variety so that the scope of handicapped students' choice of living accommodations is, as a whole, comparable to that of nonhandicapped students.

(b) *Other housing.* A recipient that assists any agency, organization, or person in making housing available to any of its students shall take such action as may be necessary to assure itself that such housing is, as a whole, made available in a manner that does not result in discrimination on the basis of handicap.

§ 84.46 Financial and employment assistance to students.

(a) *Provision of financial assistance.* (1) In providing financial assistance to qualified handicapped persons, a recipient to which this subpart applies may not (i), on the basis of handicap, provide less assistance than is provided to nonhandicapped persons, limit eligibility for assistance, or otherwise discriminate or (ii) assist any entity or person that provides assistance to any of the recipient's students in a manner that discriminates against qualified handicapped persons on the basis of handicap.

(2) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established under wills, trusts, bequests, or similar legal instruments that require awards to be made on the basis of factors that discriminate or have the effect of discriminating on the basis of handicap only if the overall effect of the award of scholarships, fellowships, and other forms of financial assistance is not discriminatory on the basis of handicap.

(b) *Assistance in making available outside employment.* A recipient that assists any agency, organization, or person in providing employment opportunities to any of its students shall assure itself that such employment opportunities, as a whole, are made available in a manner that would not violate Subpart B if they were provided by the recipient.

(c) *Employment of students by recipients.* A recipient that employs any of its students may not do so in a manner that violates Subpart B.

§ 84.47 Nonacademic services.

(a) *Physical education and athletics.* (1) In providing physical education courses and athletics and similar programs and activities to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors interscholastic, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different only if separation or differentiation is consistent with the requirements of § 84.43(d) and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

(b) *Counseling and placement services.* A recipient to which this subpart applies that provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities. This requirement does not preclude a recipient from providing factual information about licensing and certification requirements that may present obstacles to handicapped persons in their pursuit of particular careers.

(c) *Social organizations.* A recipient that provides significant assistance to fraternities, sororities, or similar organizations shall assure itself that the membership practices of such organizations do not permit discrimination otherwise prohibited by this subpart.

§§ 84.48—84.50 [Reserved]

Subpart F—Health, Welfare, and Social Services

§ 84.51 Application of this subpart.

Subpart F applies to health, welfare, and other social service programs and activities that receive or benefit from federal financial assistance and to recipients that operate, or that receive or benefit from federal financial assistance for the operation of, such programs or activities.

§ 84.52 Health, welfare, and other social services.

(a) *General.* In providing health, welfare, or other social services or benefits, a recipient may not, on the basis of handicap:

(1) Deny a qualified handicapped person these benefits or services;

(2) Afford a qualified handicapped person an opportunity to receive benefits or services that is not equal to that offered nonhandicapped persons;

(3) Provide a qualified handicapped person with benefits or services that are not as effective (as defined in § 84.4(b)) as the benefits or services provided to others;

(4) Provide benefits or services in a manner that limits or has the effect of limiting the participation of qualified handicapped persons; or

(5) Provide different or separate benefits or services to handicapped persons except where necessary to provide qualified handicapped persons with benefits and services that are as effective as those provided to others.

(b) *Notice.* A recipient that provides notice concerning benefits or services or written material concerning waivers of rights or consent to treatment shall take such steps as are necessary to ensure that qualified handicapped persons, including those with impaired sensory or speaking skills, are not denied effective notice because of their handicap.

(c) *Emergency treatment for the hearing impaired.* A recipient hospital that provides health services or benefits shall establish a procedure for effective communication with persons with impaired hearing for the purpose of providing emergency health care.

(d) *Auxiliary aids.* (1) A recipient to which this subpart applies that employs fifteen or more persons shall provide appropriate auxiliary aids to persons with impaired sensory, manual, or speaking skills, where necessary to afford such persons an equal opportunity to benefit from the service in question.

(2) The Director may require recipients with fewer than fifteen employees to provide auxiliary aids where the provision of aids would not significantly impair the ability of the recipient to provide its benefits or services.

(3) For the purpose of this paragraph, auxiliary aids may include brailled and taped material, interpreters, and other aids for persons with impaired hearing or vision.

§ 84.53 Drug and alcohol addicts.

A recipient to which this subpart applies that operates a general hospital or outpatient facility may not discriminate in admission or treatment against a drug or alcohol abuser or alcoholic who is suffering from a medical condition, because of the person's drug or alcohol abuse or alcoholism.

§ 84.54 Education of institutionalized persons.

A recipient to which this subpart applies and that operates or supervises a program or activity for persons who are institutionalized because of handicap shall ensure that each qualified handicapped person, as defined in § 84.3(k)(2), in its program or activity is provided an appropriate education, as defined in § 84.33(b). *Nothing in this section shall be interpreted as altering in any way the obligations of recipients under Subpart D.*

§§ 84.55–84.60 [Reserved]

Subpart G—Procedures

§ 84.61 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 apply to this part. These procedures are found in §§ 80.6–80.10 and Part 81 of this Title.

§§ 84.62–84.99 [Reserved]

NOTE: Incorporation by reference provisions approved by the Director of the Federal Register, May 27, 1975. Incorporated documents are on file at the Office of the Federal Register.

APPENDIX A—ANALYSIS OF FINAL REGULATION

SUBPART A—GENERAL PROVISIONS

Definitions—1. *"Recipient".* Section 84.3 contains definitions used throughout the regulation. Most of the comments concerning § 84.3(f), which contains the definition of "recipient," commended the inclusion of recipients whose sole source of federal financial assistance is Medicaid. The Secretary believes that such Medicaid providers should be regarded as recipients under the statute and the regulation and should be held individually responsible for administering services in a nondiscriminatory fashion. Accordingly, § 84.3(f) has not been changed. Small Medicaid providers, however, are exempt from some of the regulation's administrative provisions (those that apply to recipients with fifteen or more employees). And such recipients will be permitted to refer patients to accessible facilities in certain limited circumstances under revised § 84.22(b). The Secretary recognizes the difficulties involved in federal enforcement of this regulation with respect to thousands of individual Medicaid providers. As in the case of title VI of the Civil Rights Act of 1964, the Office for Civil Rights will concentrate its compliance efforts on the state Medicaid agencies and will look primarily to them to ensure compliance by individual providers.

One other comment requested that the regulation specify that nonpublic elementary and secondary schools that are not otherwise recipients do not become recipients by virtue of the fact their students participate in certain federally funded programs. The Secretary believes it unnecessary to amend the regulation in this regard, because almost identical language in the Department's regulations implementing title VI and title IX of the Education Amendments of 1972 has consistently been interpreted so as not to render such schools recipients. These schools, however, are indirectly subject to the substantive requirements of this regulation through the application of § 84.4(b)(iv), which prohibits recipients from assisting agencies that discriminate on the basis of handicap in providing services to beneficiaries of the recipients' programs.

2. *"Federal financial assistance".* In § 84.3(h), defining federal financial assistance, a clarifying change has been made: procurement contracts are specifically excluded. They are covered, however, by the Department of Labor's regulation under section 503. The Department has never considered such contracts to be contracts of assistance; the explicit exemption has been added only to avoid possible confusion.

The proposed regulation's exemption of contracts of insurance or guaranty has been retained. A number of comments argued for its deletion on the ground that section 504, unlike title VI and title IX, contains no statutory exemption for such contracts. There is no indication, however, in the legislative history of the Rehabilitation Act of 1973 or of the amendments to that Act in 1974, that Congress intended section 504 to have a broader application, in terms of federal financial assistance, than other civil rights statutes. Indeed, Congress directed that section 504 be implemented in the same manner as titles VI and IX. In view of the long established exemption of contracts of insurance or guaranty under title VI, we think it unlikely that Congress intended section 504 to apply to such contracts.

In its May 1976 Notice of Intent, the Department suggested that the arrangement under which individual practitioners, hospitals, and other facilities receive reimbursement for providing services to beneficiaries under Part B of title XVIII of the Social Security Act (Medicare) constitutes a contract of insurance or guaranty and thus falls within the exemption from the regulation. This explanation oversimplified the Department's view of whether Medicare Part B constitutes Federal financial assistance. The Department's position has consistently been that, whether or not Medicare Part B arrangements involve a contract of insurance or guaranty, no Federal financial assistance flows from the Department to the doctor or other practitioner under the program, since Medicare Part B—like other social security programs—is basically a program of payments to direct beneficiaries.

3. *"Handicapped person".* Section 84.3(j), which defines the class of persons protected under the regulation, has not been substantially changed. The definition of handicapped person in paragraph (j)(1) conforms to the statutory definition of handicapped person that is applicable to section 504, as set forth in section 111(a) of the Rehabilitation Act Amendments of 1974, Pub. L. 93-516.

The first of the three parts of the statutory and regulatory definition includes any person who has a physical or mental impairment that substantially limits one or more major life activities. Paragraph (j)(2)(i) further defines physical or mental impairments. The definition does not set forth a list of specific diseases and conditions that constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of any such list. The term includes, however, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and, as discussed below, drug addiction and alcoholism.

It should be emphasized that a physical or mental impairment does not constitute a handicap for purposes of section 504 unless its severity is such that it results in a substantial limitation of one or more major life activities. Several comments observed the lack of any definition in the proposed regulation of the phrase "substantially limits." The Department does not believe that a definition of this term is possible at this time.

A related issue raised by several comments is whether the definition of handicapped person is unreasonably broad. Comments suggested narrowing the definition in various ways. The most common recommendation was that only "traditional" handicaps be covered. The Department continues to believe, however, that it has no flexibility within the statutory definition to limit the term to persons who have those severe, permanent, or progressive conditions that are most commonly regarded as handicaps. The Department intends, however, to give particular attention in its enforcement of section 504 to eliminating discrimination against persons with the severe handicaps that were the focus of concern in the Rehabilitation Act of 1973.

The definition of handicapped person also includes specific limitations on what persons are classified as handicapped under the regulation. The first of the three parts of the definition specifies that only physical and mental handicaps are included. Thus, environmental, cultural, and economic disadvantage are not in themselves covered; nor are prison records, age, or homosexuality. Of course, if a person who has any of these characteristics also has a physical or mental handicap, the person is included within the definition of handicapped person.

In paragraph (j)(2)(i), physical or mental impairment is defined to include, among other impairments, specific learning disabilities. The Department will interpret the term as it is used in section 602 of the Education of the Handicapped Act, as amended. Paragraph (15) of section 602 uses the term "specific learning disabilities" to describe such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

Paragraph (j)(2)(i) has been shortened, but not substantively changed, by the deletion of clause (C), which made explicit the inclusion of any condition which is mental or physical but whose precise nature is not at present known. Clauses (A) and (B) clearly comprehend such conditions.

The second part of the statutory and regulatory definition of handicapped person includes any person who has a record of a physical or mental impairment that substantially limits a major life activity. Under the definition of "record" in paragraph (j)(2)(iii), persons who have a history of a handicapping condition but no longer have the condition, as well as persons who have been incorrectly classified as having such a condition, are protected from discrimination under section 504. Frequently occurring examples of the first group are persons with histories of mental or emotional illness, heart disease, or cancer; of the second group, persons who have been misclassified as mentally retarded.

The third part of the statutory and regulatory definition of handicapped person includes any person who is regarded as having a physical or mental impairment that substantially limits one or more major life activities. It includes many persons who are ordinarily considered to be handicapped but who do not technically fall within the first two parts of the statutory definition, such as persons with a limp. This part of the definition also includes some persons who might not ordinarily be considered handicapped, such as persons with disfiguring scars, as well as persons who have no physical or mental impairment but are treated by a recipient as if they were handicapped.

4. *Drug addicts and alcoholics.* As was the case during the first comment period, the issue of whether to include drug addicts and alcoholics within the definition of handicapped person was of major concern to many commenters. The arguments presented on each side of the issue were similar during the two comment periods, as was the preference of commenters for exclusion of this group of persons. While some comments reflected misconceptions about the implications of including alcoholics and drug addicts within the scope of the regulation, the Secretary understands the concerns that underlie the comments on this question and recognizes that application of section 504 to active alcoholics and drug addicts presents sensitive and difficult questions that must be taken into account in interpretation and enforcement.

The Secretary has carefully examined the issue and has obtained a legal opinion from the Attorney General. That opinion concludes that drug addiction and alcoholism are "physical or mental impairments" within the meaning of section 7(6) of the Rehabilitation Act of 1973, as amended, and that drug addicts and alcoholics are therefore handicapped for purposes of section 504 if their impairment substantially limits one of their major life activities. The Secretary therefore believes that he is without authority to exclude these conditions from the definition. There is a medical and legal consensus that alcoholism and drug addiction are diseases, although there is disagreement as to whether they are primarily mental or physical. In addition, while Congress did not focus specifically on the problems of drug addiction and alcoholism in enacting section 504, the committees that considered the Rehabilitation Act of 1973 were made aware of the Department's long-standing practice of treating addicts and alcoholics as handicapped individuals eligible for rehabilitation services under the Vocational Rehabilitation Act.

The Secretary wishes to reassure recipients that inclusion of addicts and alcoholics within the scope of the regulation will not lead to the consequences feared by many commenters. It cannot be emphasized too strongly that the statute and the regulation apply only to discrimination against qualified handicapped persons solely by reason of their handicap. The fact that drug addiction and alcoholism may be handicaps does not mean that these conditions must be ignored in determining whether an individual is qualified for services or employment opportunities. On the contrary, a recipient may hold a drug addict or alcoholic to the same standard of performance and behavior to which it holds others, even if any unsatisfactory performance or behavior is related to the person's drug addiction or alcoholism. In other words, while an alcoholic or drug addict may not be denied services or disqualified from employment solely because of his or her condition, the behavioral manifestations of the condition may be taken into account in determining whether he or she is qualified.

With respect to the employment of a drug addict or alcoholic, if it can be shown that the addiction or alcoholism prevents successful performance of the job, the person need not be provided the employment opportunity in question. For example, in making employment decisions, a recipient may judge addicts and alcoholics on the same basis it judges all other applicants and employees. Thus, a recipient may consider—for all applicants including drug addicts and alcoholics—past personnel records, absenteeism, disruptive, abusive, or dangerous behavior, violations of rules and unsatisfactory work performance. Moreover, employers may enforce rules prohibiting the possession or use of alcohol or drugs in the work-place, provided that such rules are enforced against all employees.

With respect to services, there is evidence that drug addicts and alcoholics are often denied treatment at hospitals for conditions unrelated to their addiction or alcoholism. In addition, some addicts and alcoholics have been denied emergency treatment. These practices have been specifically prohibited by section 407 of the Drug Abuse Office and Treatment Act of 1972 (21 U.S.C. 1174) and section 321 of the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (42 U.S.C. 4581), as amended. These statutory provisions are also administered by the Department's Office for Civil Rights and are implemented in § 84.53 of this regulation.

With respect to other services, the implications of coverage of alcoholics and drug addicts are two-fold: first, no person may be excluded from services solely by reason of the presence or history of these conditions; second, to the extent that the manifestations of the condition prevent the person from meeting the basic eligibility requirements of the program or cause substantial interference with the operation of the program, the condition may be taken into consideration. Thus, a college may not exclude an addict or alcoholic as a student, on the basis of addiction or alcoholism, if the person can successfully participate in the education program and complies with the rules of the college and if his or her behavior does not impede the performance of other students.

Of great concern to many commenters was the question of what effect the inclusion of drug addicts and alcoholics as handicapped persons would have on school disciplinary rules prohibiting the use or possession of drugs or alcohol by students. Neither such rules nor their application to drug addicts or alcoholics is prohibited by this regulation, provided that the rules are enforced evenly with respect to all students.

5. "Qualified handicapped person." Paragraph (k) of § 84.3 defines the term "qualified handicapped person." Throughout the regulation, this term is used instead of the statutory term "otherwise qualified handicapped person." The Department believes that the omission of the word "otherwise" is necessary in order to comport with the intent of the statute because, read literally, "otherwise" qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be "otherwise qualified" for the job of driving. Clearly, such a result was not intended by Congress. In all other respects, the terms "qualified" and "otherwise qualified" are intended to be interchangeable.

Section 84.3(k)(1) defines a qualified handicapped person with respect to employment as a handicapped person who can, with reasonable accommodation, perform the essential functions of the job in question. The term "essential functions" does not appear in the corresponding provision of the Department of Labor's section 503 regulation, and a few commenters objected to its inclusion on the ground that a handicapped person should be able to perform all job tasks. However, the Department believes that inclusion of the phrase is useful in emphasizing that handicapped persons should not be disqualified simply because they may have difficulty in performing tasks that bear only a marginal relationship to a particular job. Further, we are convinced that inclusion of the phrase is not inconsistent with the Department of Labor's application of its definition.

Certain commenters urged that the definition of qualified handicapped person be amended so as explicitly to place upon the employer the burden of showing that a particular mental or physical characteristic is essential. Because the same result is achieved by the requirement contained in paragraph (a) of § 84.13, which requires an employer to establish that any selection criterion that tends to screen out handicapped persons is job-related, that recommendation has not been followed.

Section 84.3(k)(2) (formerly § 84.3(k)(3)) defines qualified handicapped person, with respect to preschool, elementary, and secondary programs, in terms of age. Several commenters recommended that eligibility for the services be based upon the standard of substantial benefit, rather than age, because of the need of many handicapped children for early or extended services if they are to have an equal opportunity to benefit from education programs. No change has been made in this provision, again because of the extreme difficulties in administration that would result from the choice of the former standard. Under the remedial action provisions of § 84.6(a)(3), however, persons beyond the age limits prescribed in § 84.3(k)(2) may in appropriate cases be required to be provided services that they were formerly denied because of a recipient's violation of section 504.

Section 84.3(k)(2) states that a handicapped person is qualified for preschool, elementary, or secondary services if the person is of an age at which nonhandicapped persons are eligible for such services or at which state law mandates the provision of educational services to handicapped persons. In addition, the extended age ranges for which recipients must provide full educational opportunity to all handicapped persons in order to be eligible for assistance under the Education of the Handicapped Act—generally, 3-18 as of September 1978, and 3-21 as of September 1980 are incorporated by reference in this paragraph.

Section 84.3(k)(3) (formerly § 84.3(k)(2)) defines qualified handicapped person with respect to postsecondary educational programs. As revised, the paragraph means that both academic and technical standards must be met by applicants to these programs. The term "technical standards" refers to all nonacademic admissions criteria that are essential to participation in the program in question.

6. *General prohibitions against discrimination.* Section 84.4 contains general prohibitions against discrimination applicable to all recipients of assistance from this Department.

Paragraph (b)(1)(i) prohibits the exclusion of qualified handicapped persons from aids, benefits, or services, and paragraph (ii) requires that equal opportunity to participate or benefit be provided. Paragraph (iii) requires that services provided to handicapped persons be as effective as those provided to the nonhandicapped. In paragraph (iv), different or separate services are prohibited except when necessary to provide equally effective benefits.

In this context, the term "equally effective," defined in paragraph (b)(2), is intended to encompass the concept of equivalent, as opposed to identical, services and to acknowledge the fact that, in order to meet the individual needs of handicapped persons to the same extent that the corresponding needs of nonhandicapped persons are met, adjustments to regular programs or the provision of different programs may sometimes be necessary. For example, a welfare office that uses the telephone for communicating with its clients must provide alternative modes of communicating with its deaf clients. This standard parallels the one established under title VI of Civil Rights Act of 1964 with respect to the provision of educational services to students whose primary language is not English. See *Lau v. Nichols*, 414 U.S. 563 (1974). To be equally effective, however, an aid, benefit, or service need not produce equal results; it merely must afford an equal opportunity to achieve equal results.

It must be emphasized that, although separate services must be required in some instances, the provision of unnecessarily separate or different services is discriminatory. The addition to paragraph (b)(2) of the phrase "in the most integrated setting appropriate to the person's needs" is intended to reinforce this general concept. A new paragraph (b)(3) has also been added to § 84.4, requiring recipients to give qualified handicapped persons the option of participating in regular programs despite the existence of permissibly separate or different programs. The requirement has been reiterated in §§ 84.38 and 84.47 in connection with physical education and athletics programs.

Section 84.4(b)(1)(v) prohibits a recipient from supporting another entity or person that subjects participants or employees in the recipient's program to discrimination on the basis of handicap. This section would, for example, prohibit financial support by a recipient to a community recreational group or to a professional or social organization that discriminates against handicapped persons. Among the criteria to be considered in each case are the substantiality of the relationship between the recipient and the other entity, including financial support by the recipient, and whether the other entity's activities relate so closely to the recipient's program or activity that they fairly should be considered activities of the recipient itself. Paragraph (b)(1)(vi) was added in response to comment in order to make explicit the prohibition against denying qualified handicapped persons the opportunity to serve on planning and advisory boards responsible for guiding federally assisted programs or activities.

Several comments appeared to interpret § 84.4(b)(5), which proscribes discriminatory site selection, to prohibit a recipient that is located on hilly terrain from erecting any new buildings at its present site. That, of course, is not the case. This paragraph is not intended to apply to construction of additional buildings at an existing site. Of course, any such facilities must be made accessible in accordance with the requirements of § 84.23.

7. *Assurances of compliance.* Section 84.5(a) requires a recipient to submit to the Director an assurance that each of its programs and activities receiving or benefiting from Federal financial assistance from this Department will be conducted in compliance with this regulation. To facilitate the submission of assurances by thousands of Medicaid providers, the Department will follow the title VI procedures of accepting, in lieu of assurances, certification on Medicaid vouchers. Many commenters also sought relief from the paperwork requirements imposed by the Department's enforcement of its various civil rights responsibilities by requesting the Department to issue one form incorporating title VI, title IX, and section 504 assurances. The Secretary is sympathetic to this request. While it is not feasible to adopt a single civil rights assurance form at this time, the Office for Civil Rights will work toward that goal.

8. *Private rights of action.* Several comments urged that the regulation incorporate provision granting beneficiaries a private right of action against recipients under section 504. To confer such a right is beyond the authority of the executive branch of Government. There is, however, case law holding that such a right exists. *Lloyd v. Regional Transportation Authority*, 548 F. 2d 1277 (7th Cir. 1977); *see Hairston v. Drosick*, Civil No. 75-0691 (S.D. W. Va., Jan. 14, 1976); *Gurmankin v. Costanzo*, 411 F. Supp. 982 (E.D. Pa. 1976); *cf. Lau v. Nichols, supra*.

9. *Remedial action.* Where there has been a finding of discrimination, § 84.6 requires a recipient to take remedial action to overcome the effects of the discrimination. Actions that might be required under paragraph (a)(1) include provision of services to persons previously discriminated against, reinstatement of employees, and development of a remedial action plan. Should a recipient fail to take required remedial action, the ultimate sanctions of court action or termination of Federal financial assistance may be imposed.

Paragraph (a)(2) extends the responsibility for taking remedial action to a recipient that exercises control over a noncomplying recipient. Paragraph (a)(3) also makes clear that handicapped persons who are not in the program at the time that remedial action is required to be taken may also be the subject of such remedial action. This paragraph has been revised in response to comments in order to include persons who would have been in the program if discriminatory practices had not existed. Paragraphs (a)(1), (2), and (3) have also been amended in response to comments to make plain that, in appropriate cases, remedial action might be required to redress clear violations of the statute itself that occurred before the effective date of this regulation.

10. *Voluntary action.* In § 84.6(b), the term "voluntary action" has been substituted for the term "affirmative action" because the use of the latter term led to some confusion. We believe the term "voluntary action" more accurately reflects the purpose of the paragraph. This provision allows action, beyond that required by the regulation, to overcome conditions that led to limited participation by handicapped persons, whether or not the limited participation was caused by any discriminatory actions on the part of the recipient. Several commenters urged that paragraphs (a) and (b) be revised to require remedial action to overcome effects of prior discriminatory practices regardless of whether there has been an express finding of discrimination. The self-evaluation requirement in paragraph (c) accomplishes much the same purpose.

11. *Self-evaluation.* Paragraph (c) requires recipients to conduct a self-evaluation in order to determine whether their policies or practices may discriminate against handicapped persons and to take steps to modify any discriminatory policies and practices and their effects. The Department received many comments approving of the addition to paragraph (c) of a requirement that recipients seek the assistance of handicapped persons in the self-evaluation process. This paragraph has been further amended to require consultation with handicapped persons or organizations representing them before recipients undertake the policy modifications and remedial steps prescribed in paragraphs (c)(ii) and (iii).

Paragraph (c)(2), which sets forth the recordkeeping requirements concerning self-evaluation, now applies only to recipients with fifteen or more employees. This change was made as part of an effort to reduce unnecessary or counterproductive administrative obligations on small recipients. For those recipients required to keep records, the requirements have been made more specific; records must include a list of persons consulted and a description of areas examined, problems identified, and corrective steps taken. Moreover, the records must be made available for public inspection.

12. *Grievance procedure.* Section 84.7 (formerly § 84.8) requires recipients with fifteen or more employees to designate an individual responsible for coordinating its compliance efforts and to adopt a grievance procedure. Two changes were made in the section in response to comment. A general requirement that appropriate due process procedures be followed has been added. It was decided that the details of such procedures could not at this time be specified because of the varied nature of the persons and entities who must establish the procedures and of the programs to which they apply. A sentence was also added to make clear that

grievance procedures are not required to be made available to unsuccessful applicants for employment or to applicants for admission to colleges and universities.

The regulation does not require that grievance procedures be exhausted before recourse is sought from the Department. However, the Secretary believes that it is desirable and efficient in many cases for complainants to seek resolution of their complaints and disputes at the local level and therefore encourages them to use available grievance procedures.

A number of comments asked whether compliance with this section or the notice requirements of § 84.8 could be coordinated with comparable action required by the title IX regulation. The Department encourages such efforts.

13. *Notice.* Section 84.8 (formerly § 84.9) sets forth requirements for dissemination of statements of nondiscrimination policy by recipients.

It is important that both handicapped persons and the public at large be aware of the obligations of recipients under section 504. Both the Department and recipients have responsibilities in this regard. Indeed the Department intends to undertake a major public information effort to inform persons of their rights under section 504 and this regulation. In § 84.8 the Department has sought to impose a clear obligation on major recipients to notify beneficiaries and employees of the requirements of section 504, without dictating the precise way in which this notice must be given. At the same time, we have avoided imposing requirements on small recipients (those with fewer than fifteen employees) that would create unnecessary and counterproductive paperwork burdens on them and unduly stretch the enforcement resources of the Department.

Section 84.8(a), as simplified, requires recipients with fifteen or more employees to take appropriate steps to notify beneficiaries and employees of the recipient's obligations under section 504. The last sentence of § 84.8(a) has been revised to list possible, rather than required, means of notification. Section 84.8(b) requires recipients to include a notification of their policy of nondiscrimination in recruitment and other general information materials.

In response to a number of comments, § 84.8 has been revised to delete the requirements of publication in local newspapers, which has proved to be both troublesome and ineffective. Several commenters suggested that notification on separate forms be allowed until present stocks of publications and forms are depleted. The final regulation explicitly allows this method of compliance. The separate form should, however, be included with each significant publication or form that is distributed.

Former § 84.9(b)(2), which prohibited the use of materials that might give the impression that a recipient excludes qualified handicapped persons from its program, has been deleted. The Department is convinced by the comments that this provision is unnecessary and difficult to apply. The Department encourages recipients, however, to include in their recruitment and other general information materials photographs of handicapped persons and ramps and other features of accessible buildings.

Under new § 84.9 the Director may, under certain circumstances, require recipients with fewer than fifteen employees to comply with one or more of these requirements. Thus, if experience shows a need for imposing notice or other requirements on particular recipients or classes of small recipients, the Department is prepared to expand the coverage of these sections.

14. *Inconsistent State laws.* Section 84.10(a) states that compliance with the regulation is not excused by state or local laws limiting the eligibility of qualified handicapped persons to receive services or to practice an occupation. The provision thus applies only with respect to state or local laws that unjustifiably differentiate on the basis of handicap.

Paragraph (b) further points out that the presence of limited employment opportunities in a particular profession does not excuse a recipient from complying with the regulation. Thus, a law school could not deny admission to a blind applicant because blind lawyers may find it more difficult to find jobs than do nonhandicapped lawyers.

Subpart B—Employment Practices

Subpart B prescribes requirements for nondiscrimination in the employment practices of recipients of Federal financial assistance administered by the Department. This subpart is consistent with the employment provisions of the Department's regulation implementing title IX of the Education Amendments of 1972 (45 CFR Part 86) and the regulation of the Department of Labor under section 503 of the Rehabilitation Act, which requires certain Federal contractors to take affirmative action in the employment and advancement of qualified handicapped persons. All recipients subject to title IX are also subject to this regulation. In addition, many recipients subject to this regulation receive Federal procurement contracts in excess of $2500 and are therefore also subject to section 503.

15. *Discriminatory practices.* Section 84.11 sets forth general provisions with respect to discrimination in employment. A new paragraph (a)(2) has been added to clarify the employment obligations of recipients that receive federal funds under Part B of the Education of the Handicapped Act, as amended (EHA). Section 606 of the EHA obligates elementary or secondary school systems that receive EHA funds to take positive steps to employ and advance in employment qualified handicapped persons. This obligation is similar to the nondiscrimination requirement of section 504 but requires recipients to take additional steps to hire and promote handicapped persons. In enacting section 606 Congress chose the words "positive steps" instead of "affirmative action" advisedly and did not intend section 606 to incorporate the types of activities required under Executive Order 11246 (affirmative action on the basis of race, color, sex, or national origin) or under sections 501 and 503 of the Rehabilitation Act of 1973.

Paragraph (b) of § 84.11 sets forth the specific aspects of employment covered by the regulation. Paragraph (c) provides that inconsistent provisions of collective bargaining agreements do not excuse noncompliance.

16. *Reasonable accommodation.* The reasonable accommodation requirement of § 84.12 generated a substantial number of comments. The Department remains convinced that its approach is both fair and effective. Moreover, the Department of Labor reports that it has experienced little difficulty in administering the requirement of reasonable accommodation. The provision therefore remains basically unchanged from the proposed regulation.

Section 84.12 requires a recipient to make reasonable accommodation to the known physical or mental limitations of a handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program. Where a handicapped person is not qualified to perform a particular job, where reasonable accommodation does not overcome the effects of a person's handicap, or where reasonable accommodation causes undue hardship to the employer, failure to hire or promote the handicapped person will not be considered discrimination.

Section 84.12(b) lists some of the actions that constitute reasonable accommodation. The list is neither all-inclusive nor meant to suggest that employers must follow all of the actions listed.

Reasonable accommodation includes modification of work schedules, including part-time employment, and job restructuring. Job restructuring may entail shifting nonessential duties to other employees. In other cases, reasonable accommodation may include physical modifications or relocation of particular offices or jobs so that they are in facilities or parts of facilities that are accessible to and usable by handicapped persons. If such accommodations would cause undue hardship to the employer, they need not be made.

Paragraph (c) of this section sets forth the factors that the Office for Civil Rights will consider in determining whether an accommodation necessary to enable an applicant or employee to perform the duties of a job would impose an undue hardship. The weight given to each of these factors in making the determination as to whether an accommodation constitutes undue hardship will vary depending on the facts of a particular situation. Thus, a small day-care center might not be required to expend more than a nominal sum, such as that necessary to equip a telephone for use by a secretary with impaired hearing, but a large school district might be required to make available a teacher's aide to a blind applicant for a teaching job. Further, it might be considered reasonable to require a state welfare agency to accommodate a deaf employee by providing an interpreter, while it would constitute an undue hardship to impose that requirement on a provider of foster home care services.

The reasonable accommodation standard in § 84.12 is similar to the obligation imposed upon federal contractors in the regulation implementing section 503 of the Rehabilitation Act of 1973, administered by the Department of Labor. Although the wording of the reasonable accommodation provisions of the two regulations is not identical, the obligation that the two regulations impose is the same, and the federal government's policy in implementing the two sections will be uniform. The Department adopted the factors listed in paragraph (c) instead of the "business necessity" standard of the Labor regulation because that term seemed inappropriate to the nature of the programs operated by the majority of institutions subject to this regulation, e.g., public school systems, hospitals, colleges and universities, nursing homes, day-care centers, and welfare offices. The factors listed in paragraph (c) are intended to make the rationale underlying the business necessity standard applicable to and understandable by recipients of HEW funds.

17. *Tests and selection criteria.* Revised § 84.13(a) prohibits employers from using test or other selection criteria that screen out or tend to screen out handicapped persons unless the test or criterion is shown to be job-related and alternative tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Director to be available. This paragraph is an application of the principle established under title VII of the Civil Rights Act of 1964 in *Griggs v. Duke Power Company*, 401 U.S. 424 (1971).

Under the proposed section, a statistical showing of adverse impact on handicapped persons was required to trigger an employer's obligation to show that employment criteria and qualifications relating to handicap were necessary. This requirement was changed because the small number of handicapped persons taking tests would make statistical showings of "disproportionate, adverse effect" difficult and burdensome. Under the altered, more workable provision, once it is shown that an employment test substantially limits the opportunities of handicapped persons, the employer must show the test to be job-related. A recipient is no longer limited to using predictive validity studies as the method for demonstrating that a test or other selection criterion is in fact job-related. Nor, in all cases, are predictive validity studies sufficient to demonstrate that a test or criterion is job-related. In addition, § 84.13(a) has been revised to place the burden on the Director, rather than the recipient, to identify alternate tests.

Section 84.13(b) requires that a recipient take into account that some tests and criteria depend upon sensory, manual, or speaking skills that may not themselves be necessary to the job in question but that may make the handicapped person unable to pass the test. The recipient must select and administer tests so as best to ensure that the test will measure the handicapped person's ability to perform on the job rather than the person's ability to see, hear, speak, or perform manual tasks, except, of course, where such skills are the factors that the test purports to measure. For example, a person with a speech impediment may be perfectly qualified for jobs that do not or need not, with reasonable accommodation, require ability to speak clearly. Yet, if given an oral test, the person will be unable to perform in a satisfactory manner. The test results will not, therefore, predict job performance but instead will reflect impaired speech.

18. *Preemployment inquiries.* Section 84.14, concerning preemployment inquiries, generated a large number of comments. Commenters representing handicapped persons strongly favored a ban on preemployment inquiries on the ground that such inquiries are often used to discriminate against handicapped persons and are not necessary to serve any legitimate interests of employers. Some recipients, on the other hand, argued that preemployment inquiries are necessary to determine qualifications of the applicant, safety hazards caused by a particular handicapping condition, and accommodations that might be required.

The Secretary has concluded that a general prohibition of preemployment inquiries is appropriate. However, a sentence has been added to paragraph (a) to make clear that an employer may inquire into an applicant's ability to perform job-related tasks but may not ask if the person has a handicap. For example, an employer may not ask on an employment form if an applicant is visually impaired but may ask if the person has a current driver's license (if that is a necessary qualification for the position in question). Similarly, employers may make inquiries about an applicant's ability to perform a job safely. Thus, an employer may not ask if an applicant is an epileptic but may ask whether the person can perform a particular job without endangering other employees.

Section 84.14(b) allows preemployment inquiries only if they are made in conjunction with required remedial action to correct past discrimination, with voluntary action to overcome past conditions that have limited the participation of handicapped persons, or with obligations under section 503 of the Rehabilitation Act of 1973. In these instances, paragraph (b) specifies certain safeguards that must be followed by the employer.

Finally, the revised provision allows an employer to condition offers of employment to handicapped persons on the results of medical examinations, so long as the examinations are administered to all employees in a nondiscriminatory manner and the results are treated on a confidential basis.

19. *Specific acts of Discrimination.* Sections 84.15 (recruitment), 84.16 (compensation), 84.17 (job classification and structure) and 84.18 (fringe benefits) have been deleted from the regulation as unnecessarily duplicative of § 84.11 (discrimination prohibited). The deletion of these sections in no way changes the substantive obligations of employers subject to this regulation from those set forth in the July 16 proposed regulation. These deletions bring the regulation closer in form to the Department of Labor's section 503 regulation.

Proposed § 84.18, concerning fringe benefits, had allowed for differences in benefits or contributions between handicapped and nonhandicapped persons in situations only where such differences could be justified on an actuarial basis. Section 84.11 simply bars discrimination in providing fringe benefits and does not address the issue of actuarial differences. The Department believes that currently available data and experience do not demonstrate a basis for promulgating a regulation specifically allowing for differences in benefits or contributions.

SUBPART C—PROGRAM ACCESSIBILITY

In general, Subpart C prohibits the exclusion of qualified handicapped persons from federally assisted programs or activities because a recipient's facilities are inaccessible or unusable.

20. *Existing facilities.* Section 84.22 maintains the same standard for nondiscrimination in regard to existing facilities as was included in the proposed regulation. The section states that a recipient's program or activity, when viewed in its entirety, must be readily accessible to and usable by handicapped persons. Paragraphs (a) and (b) make clear that a recipient is not required to make each of its existing facilities accessible to handicapped persons if its program as a whole is accessible. Accessibility to the recipient's program or activity may be achieved by a number of means, including redesign of equipment, reassignment of classes or other services to accessible buildings, and making aides available to beneficiaries. In choosing among methods of compliance, recipients are required to give priority consideration to methods that will be consistent with provision of services in the most appropriate integrated setting. Structural changes in existing facilities are required only where there is no other feasible way to make the recipient's program accessible.

Under § 84.22, a university does not have to make all of its existing classroom buildings accessible to handicapped students if some of its buildings are already accessible and if it is possible to reschedule or relocate enough classes so as to offer all required courses and a reasonable selection of elective courses in accessible facilities. If sufficient relocation of classes is not possible using existing facilities, enough alterations to ensure program accessibility are required. A university may not exclude a handicapped student from a specifically requested course offering because it is not offered in an accessible location, but it need not make every section of that course accessible.

Commenters representing several institutions of higher education have suggested that it would be appropriate for one postsecondary institution in a geographical area to be made accessible to handicapped persons and for other colleges and universities in that area to participate in that school's program, thereby developing an educational consortium for the postsecondary education of handicapped students. The Department believes that such a consortium, when developed and applied only to handicapped persons, would not constitute compliance with § 84.22, but would discriminate against qualified handicapped persons by restricting their choice in selecting institutions of higher education and would, therefore, be inconsistent with the basic objectives of the statute.

Nothing in this regulation, however, should be read as prohibiting institutions from forming consortia for the benefit of all students. Thus, if three colleges decide that it would be cost-efficient for one college to offer biology, the second physics, and the third chemistry to all students at the three colleges, the arrangement would not violate section 504. On the other hand, it would violate the regulation if the same institutions set up a consortium under which one college undertook to make its biology lab accessible, another its physics lab, and a third its chemistry lab, and under which mobility-impaired handicapped students (but not other students) were required to attend the particular college that is accessible for the desired courses.

Similarly, while a public school district need not make each of its buildings completely accessible, it may not make only one facility or part of a facility accessible if the result is to segregate handicapped students in a single setting.

All recipients that provide health, welfare, or other social services may also comply with § 84.22 by delivering services at alternate accessible sites or making home visits. Thus, for example, a pharmacist might arrange to make home deliveries of drugs. Under revised § 84.22(c), small providers of health, welfare, and social services (those with fewer than fifteen employees) may refer a beneficiary to an accessible provider of the desired service, but only if no means of meeting the program accessibility requirement other than a significant alteration in existing facilities is available. The referring recipient has the responsibility of determining that the other provider is in fact accessible and willing to provide the service. The Secretary believes this "last resort" referral provision is appropriate to avoid imposition of additional costs in the health care area, to encourage providers to remain in the Medicaid program, and to avoid imposing significant costs on small, low-budget providers such as day-care centers or foster homes.

A recent change in the tax law may assist some recipients in meeting their obligations under this section. Under section 2122 of the Tax Reform Act of 1976, recipients that pay federal income tax are eligible to claim a tax deduction of up to $25,000 for architectural and transportation modifications made to improve accessibility for handicapped persons. Many physicians and dentists, among others, may be eligible for this tax deduction. See 42 FR 17870 (April 4, 1977), adopting 26 CFR 7.190.

Several commenters expressed concern about the feasibility of compliance with the program accessibility standard. The Secretary believes that the standard is flexible enough to permit recipients to devise ways to make their programs accessible short of extremely expensive or impractical physical changes in facilities. Accordingly, the section does not allow for waivers. The Department is ready at all times to provide technical assistance to recipients in meeting their program accessibility responsibilities. For this purpose, the Department is establishing a special technical assistance unit. Recipients are encouraged to call upon the unit staff for advice and guidance both on structural modifications and on other ways of meeting the program accessibility requirement.

Paragraph (d) has been amended to require recipients to make all nonstructural adjustments necessary for meeting the program accessibility standard within sixty days. Only where structural changes in facilities are necessary will a recipient be permitted up to three years to accomplish program accessibility. It should be emphasized that the three-year time period is not a waiting period and that all changes must be accomplished as expeditiously as possible. Further, it is the Department's belief, after consultation with experts in the field, that outside ramps to buildings can be constructed quickly and at relatively low cost. Therefore, it will be expected that such structural additions will be made promptly to comply with § 84.22(d).

The regulation continues to provide, as did the proposed version, that a recipient planning to achieve program accessibility by making structural changes must develop a transition plan for such changes within six months of the effective date of the regulation. A number of commenters suggested extending that period to one year. The Secretary believes that such an extension is unnecessary and unwise. Planning for any necessary structural changes should be undertaken promptly to ensure that they can be completed within the three-year period. The elements of the transition plan as required by the regulation remain virtually unchanged from the proposal but § 84.22(d) now includes a requirement that the recipient make the plan available for public inspection.

Several commenters expressed concern that the program accessibility standard would result in the segregation of handicapped persons in educational institutions. The regulation will not be applied to permit such a result. See § 84.4(b)(2)(iv), prohibiting unnecessarily separate treatment; § 84.34, requiring that students in elementary and secondary schools be educated in the most integrated setting appropriate to their needs; and new § 84.43(d), applying the same standard to postsecondary education.

We have received some comments from organizations of handicapped persons on the subject of requiring, over an extended period of time, a barrier-free environment—that is, requiring the removal of all architectural barriers in existing facilities. The Department has considered these comments but has decided to take no further action at this time concerning these suggestions, believing that such action should only be considered in light of experience in implementing the program accessibility standard.

21. *New construction.* Section 84.23 requires that all new facilities, as well as alterations that could affect access to and use of existing facilities, be designed and constructed in a manner so as to make the facility accessible to and usable by handicapped persons. Section 84.23(a) has been amended so that it applies to each newly constructed facility if the construction was commenced after the effective date of the regulation. The words "if construction has commenced" will be considered to mean "if groundbreaking has taken place." Thus, a recipient will not be required to alter the design of a facility that has progressed beyond groundbreaking prior to the effective date of the regulation.

Paragraph (b) requires certain alterations to conform to the requirement of physical accessibility in paragraph (a). If an alteration is undertaken to a portion of a building the accessibility of which could be improved by the manner in which the alteration is carried out, the alteration must be made in that manner. Thus, if a doorway or wall is being altered, the door or other wall opening must be made wide enough to accommodate wheelchairs. On the other hand, if the alteration consists of altering ceilings, the provisions of this section are not applicable because this alteration cannot be done in a way that affects the accessibility of that portion of the building. The phrase "to the maximum extent feasible" has been added to allow for the occasional case in which the nature of an existing facility is such as to make it impractical or prohibitively expensive to renovate the building in a manner that results in its being entirely barrier-free. In all such cases, however, the alteration should provide the maximum amount of physical accessibility feasible.

As proposed, § 84.23(c) required compliance with the American National Standards Institute (ANSI) standard on building accessibility as the minimum necessary for compliance with the accessibility requirement of §§ 84.23 (a) and (b). The reference to the ANSI standard created some ambiguity, since the standard itself provides for waivers where other methods are equally effective in providing accessibility to the facility. Moreover, the Secretary does not wish to discourage innovation in barrier-free construction by requiring absolute adherence to a rigid design standard. Accordingly, § 84.23(c) has been revised to permit departures from particular requirements of the ANSI standard where the recipient can demonstrate that equivalent access to the facility is provided.

Section 84.23(d) of the proposed regulation, providing for a limited deferral of action concerning facilities that are subject to section 502 as well as section 504 of the Act, has been deleted. The Secretary believes that the provision is unnecessary and inappropriate to this regulation. The Department will, however, seek to coordinate enforcement activities under this regulation with those of the Architectural and Transportation Barriers Compliance Board.

SUBPART D—PRESCHOOL, ELEMENTARY, AND SECONDARY EDUCATION

Subpart D sets forth requirements for nondiscrimination in preschool, elementary, secondary, and adult education programs and activities, including secondary vocational education programs. In this context, the term "adult education" refers only to those educational programs and activities for adults that are operated by elementary and secondary schools.

The provisions of Subpart D apply to state and local educational agencies. Although the subpart applies, in general, to both public and private education programs and activities that are federally assisted, §§ 84.32 and 84.33 apply only to public programs and § 84.39 applies only to private programs; §§ 84.35 and 84.36 apply both to public programs and to those private programs that include special services for handicapped students.

Subpart D generally conforms to the standards established for the education of handicapped persons in *Mills v. Board of Education of the District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972), *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*, 334 F. Supp. 1257 (E.D. 1971), 343 F. Supp. 279 (E.D.Pa. 1972), and *Lebanks v. Spears*, 60 F.R.D. 135 (E.D. La. 1973), as well as in the Education of the Handicapped Act, as amended by Public Law 94-142 (the EHA).

The basic requirements common to those cases, to the EHA, and to this regulation are (1) that handicapped persons, regardless of the nature or severity of their handicap, be provided a free appropriate public education, (2) that handicapped students be educated with nonhandicapped students to the maximum extent appropriate to their needs, (3) that educational agencies undertake to identify and locate all unserved handicapped children, (4) that evaluation procedures be improved in order to avoid the inappropriate education that results from the misclassification of students, and (5) that procedural safeguards be established to enable parents and guardians to influence decisions regarding the evaluation and placement of their children. These requirements are designed to ensure that no handicapped child is excluded from school on the basis of handicap and, if a recipient demonstrates that placement in a regular educational setting cannot be achieved satisfactorily, that the student is provided with adequate alternative services suited to the student's needs without additional cost to the student's parents or guardian. Thus, a recipient that operates a public school system must either educate handicapped children in its regular program or provide such children with an appropriate alternative education at public expense.

It is not the intention of the Department, except in extraordinary circumstances, to review the result of individual placement and other educational decisions, so long as the school district complies with the "process" requirements of this subpart (concerning identification and location, evaluation, and due process procedures). However, the Department will place a high priority on investigating cases which may involve exclusion of a child from the education system or a pattern or practice of discriminatory placements or education.

22. *Location and notification.* Section 84.32 requires public schools to take steps annually to identify and locate handicapped children who are not receiving an education and to publicize to handicapped children and their parents the rights and duties established by section 504 and this regulation. This section has been shortened without substantive change.

23. *Free appropriate public education.* Former §§ 84.34 ("Free education") and 84.36(a) ("Suitable education") have been consolidated and revised in new § 84.33. Under § 84.33(a), a recipient is responsible for providing a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction. The word "in" encompasses the concepts of both domicile and actual residence. If a recipient places a child in a program other than its own, it remains financially responsible for the child, whether or not the other program is operated by another recipient or educational agency. Moreover, a recipient may not place a child in a program that is inappropriate or that otherwise violates the requirements of Subpart D. And in no case may a recipient refuse to provide services to a handicapped child in its jurisdiction because of another person's or entity's failure to assume financial responsibility.

Section 84.33(b) concerns the provision of appropriate educational services to handicapped children. To be appropriate, such services must be designed to meet handicapped children's individual educational needs to the same extent that those of nonhandicapped children are met. An appropriate education could consist of education in regular classes, education in regular classes with the use of supplementary services, or special education and related services. Special education may include specially designed instruction in classrooms, at home, or in private or public institutions and may be accompanied by such related services as developmental, corrective, and other supportive services (including psychological, counseling, and medical diagnostic services). The placement of the child must however, be comsistent with the requirements of § 84.34 and be suited to his or her educational needs.

The quality of the educational services provided to handicapped students must equal that of the services provided to nonhandicapped students; thus, handicapped student's teachers must be trained in the instruction of persons with the handicap in question and appropriate materials and equipment must be available. The Department is aware that the supply of adequately trained teachers may, at least at the outset of the imposition of this requirement, be insufficient to meet the demand of all recipients. This factor will be considered in determining the appropriateness of the remedy for noncompliance with this section. A new § 84.33(b)(2) has been added, which allows this requirements to be met through the full implementation of an individualized education program developed in accordance with the standards of the EHA.

Paragraph (c) of § 84.33 sets forth the specific financial obligations of a recipient. If a recipient does not itself provide handicapped persons with the requisite services, it must assume the cost of any alternate placement. If, however, a recipient offers adequate services and if alternate placement is chosen by a student's parent or guardian, the recipient need not assume the cost of the outside services. (If the parent or guardian believes that his or her child cannot be suitably educated in the recipient's program, he or she may make use of the procedures established in § 84.36.) Under this paragraph, a recipient's obligation extends beyond the provision of tuition payments in the case of placement outside the regular program. Adequate transportation must also be provided. Recipients must also pay for psychological services and those medical services necessary for diagnostic and evaluative purposes.

If the recipient places a student, because of his or her handicap, in a program that necessitates his or her being away from home, the payments must also cover room and board and nonmedical care (including custodial and supervisory care). When residential care is necessitated not by the student's handicap but by factors such as the student's home conditions, the recipient is not required to pay the cost of room and board.

Two new sentences have been added to paragraph (c)(1) to make clear that a recipient's financial obligations need not be met solely through its own funds. Recipients may rely on funds from any public or private source including insurers and similar third parties.

The EHA requires a free appropriate education to be provided to handicapped children "no later than September 1, 1978," but section 504 contains no authority for delaying enforcement. To resolve this problem, a new paragraph (d) has been added to § 84.33. Section 84.33(d) requires recipients to achieve full compliance with the free appropriate public education requirements of § 84.33 as expeditiously as possible, but in no event later than September 1, 1978. The provision also makes clear that, as of the effective date of this regulation, no recipient may exclude a qualified handicapped child from its educational program. This provision against exclusion is consistent with the order of providing services set forth in section 612(3) of the EHA, which places the highest priority on providing services to handicapped children who are not receiving an education.

24. *Educational setting.* Section 84.34 prescribes standards for educating handicapped persons with nonhandicapped persons to the maximum extent appropriate to the needs of the handicapped person in question. A handicapped student may be removed from the regular educational setting only where the recipient can show that the needs of the student would, on balance, be served by placement in another setting.

Although under § 84.34, the needs of the handicapped person are determinative as to proper placement, it should be stressed that, where a handicapped student is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore, regular placement would not be appropriate to his or her needs and would not be required by § 84.34.

Among the factors to be considered in placing a child is the need to place the child as close to home as possible. A new sentence has been added to paragraph (a) requiring recipients to take this factor into account. As pointed out in several comments, the parents' right under § 84.36 to challenge the placement of their child extends not only to placement in special classes or separate schools but also to placement in a distant school and, in particular, to residential placement. An equally appropriate educational program may exist closer to home; this issue may be raised by the parent or guardian under §§ 84.34 and 84.36.

New paragraph (b) specifies that handicapped children must also be provided nonacademic services in as integrated a setting as possible. This requirement is especially important for children whose educational needs necessitate their being solely with other handicapped children during most of each day. To the maximum extent appropriate, children in residential settings are also to be provided opportunities for participation with other children.

Section 84.34(c) (formerly § 84.38) requires that any facilities that are identifiable as being for handicapped students be comparable in quality to other facilities of the recipient. A number of comments objected to this section on the basis that it encourages the creation and maintenance of such facilities. This is not the intent of the provision. A separate facility violates section 504 unless it is indeed necessary to the provision of an appropriate education to certain handicapped students. In those instances in which such facilities are necessary (as might be the case, for example, for severely retarded persons), this provision requires that the educational services provided be comparable to those provided in the facilities of the recipient that are not identifiable as being for handicapped persons.

25. *Evaluation and placement.* Because the failure to provide handicapped persons with an appropriate education is so frequently the result of misclassification or misplacement, section 84.33(b)(1) makes compliance with its provisions contingent upon adherence to certain procedures designed to ensure appropriate classification and placement. These procedures, delineated in §§ 84.35 and 84.36, are concerned with testing and other evaluation methods and with procedural due process rights.

Section 84.35(a) requires that an individual evaluation be conducted before any action is taken with respect either to the initial placement of a handicapped child in a regular or special education program or to any subsequent significant change in that placement. Thus, a full reevaluation is not required every time an adjustment in placement is made. "Any action" includes denials of placement.

Paragraphs (b) and (c) of § 84.35 establishes procedures designed to ensure that children are not misclassified, unnecessarily labeled as being handicapped, or incorrectly placed because of inappropriate selection, administration, or interpretation of evaluation materials. This problem has been extensively documented in "Issues in the Classification of Children," a report by the Project on Classification of Exceptional Children, in which the HEW Interagency Task Force participated. The provisions of these paragraphs are aimed primarily at abuses in the placement process that result from misuse of, or undue or misplaced reliance on, standardized scholastic aptitude tests.

Paragraph (b) has been shortened but not substantively changed. The requirement in former subparagraph (1) that recipients provide and administer evaluation materials in the native language of the student has been deleted as unnecessary, since the same requirement already exists under title VI and is more appropriately covered under that statute. Subparagraphs (1) and (2) are, in general, intended to prevent misinterpretation and similar misuse of test scores and, in particular, to avoid undue reliance on general intelligence tests. Subparagraph (3) requires a recipient to administer tests to a student with impaired sensory, manual, or speaking skills in whatever manner is necessary to avoid distortion of the test results by the impairment. Former subparagraph (4) has been deleted as unnecessarily repetitive of the other provisions of this paragraph.

Paragraph (c) requires a recipient to draw upon a variety of sources in the evaluation process so that the possibility of error in classification is minimized. In particular, it requires that all significant factors relating to the learning process, including adaptive behavior, be considered. (Adaptive behavior is the effectiveness with which the individual meets the standards of personal independence and social responsibility expected of his or her age and cultural group.) Information from all sources must be documented and considered by a group of persons, and the procedure must ensure that the child is placed in the most integrated setting appropriate.

The proposed regulation would have required a complete individual reevaluation of the student each year. The Department has concluded that it is inappropriate in the section 504 regulation to require full reevaluations on such a rigid schedule. Accordingly, § 84.35(d) requires periodic reevaluations and specifies that reevaluations in accordance with the EHA will constitute compliance. The proposed regulation implementing the EHA allows reevaluation at three-year intervals except under certain specified circumstances.

Under § 84.36, a recipient must establish a system of due process procedures to be afforded to parents or guardians before the recipient takes any action regarding the identification, evaluation, or educational placement of a person who, because of handicap, needs or is believed to need special education or related services. This section has been revised. Because the due process procedures of the EHA, incorporated by reference in the proposed section 504 regulation, are inappropriate for some recipients not subject to that Act, the section now specifies minimum necessary procedures: notice, a right to inspect records, an impartial hearing with a right to representation by counsel, and a review procedure. The EHA procedures remain one means of meeting the regulation's due process requirements, however, and are recommended to recipients as a model.

26. *Nonacademic services.* Section 84.37 requires a recipient to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation. Because these services and activities are part of a recipient's education program, they must, in accordance with the

provisions of § 84.34, be provided in the most integrated setting appropriate.

Revised paragraph (c)(2) does permit separation or differentiation with respect to the provision of physical education and athletics activities, but only if qualified handicapped students are also allowed the opportunity to compete for regular teams or participate in regular activities. Most handicapped students are able to participate in one or more regular physical education and athletics activities. For example, a student in a wheelchair can participate in regular archery course, as can a deaf student in a wrestling course.

Finally, the one-year transition period provided in former § 84.37(a)(3) was deleted in response to the almost unanimous objection of commenters to that provision.

27. *Preschool and adult education.* Section 84.38 prohibits discrimination on the basis of handicap in preschool and adult education programs. Former paragraph (b), which emphasized that compensatory programs for disadvantaged children are subject to section 504, has been deleted as unnecessary, since it is comprehended by paragraph (a).

28. *Private education.* Section 84.39 sets forth the requirements applicable to recipients that operate private education programs and activities. The obligations of these recipients have been changed in two significant respects: first, private schools are subject to the evaluation and due process provisions of the subpart only if they operate special education programs; second, under § 84.39(b), they may charge more for providing services to handicapped students than to nonhandicapped students to the extent that additional charges can be justified by increased costs.

Paragraph (a) of § 84.39 is intended to make clear that recipients that operate private education programs and activities are not required to provide an appropriate education to handicapped students with special educational needs if the recipient does not offer programs designed to meet those needs. Thus, a private school that has no program for mentally retarded persons is neither required to admit such a person into its program nor to arrange or pay for the provision of the person's education in another program. A private recipient without a special program for blind students, however, would not be permitted to exclude, on the basis of blindness, a blind applicant who is able to participate in the regular program with minor adjustments in the manner in which the program is normally offered.

SUBPART E—POSTSECONDARY EDUCATION

Subpart E prescribes requirements for nondiscrimination in recruitment, admission, and treatment of students in postsecondary education programs and activities, including vocational education.

29. *Admission and recruitment.* In addition to a general prohibition of discrimination on the basis of handicap in § 84.42(a), the regulation delineates, in § 84.42(b), specific prohibitions concerning the establishment of limitations on admission of handicapped students, the use of tests or selection criteria, and preadmission inquiry. Several changes have been made in this provision.

Section 84.42(b) provides that postsecondary educational institutions may not use any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons unless it has been validated as a predictor of academic success and alternate tests or criteria with a less disproportionate, adverse effect are shown by the Department to be available. There are two significant changes in this approach from the July 16 proposed regulation.

First, many commenters expressed concern that § 84.42(b)(2)(ii) could be interpreted to require a "global search" for alternate tests that do not have a disproportionate, adverse impact on handicapped persons. This was not the intent of the provision and, therefore, it has been amended to place the burden on the Director of the Office for Civil Rights, rather than on the recipient, to identify alternate tests.

Second, a new paragraph (d), concerning validity studies, has been added. Under the proposed regulation, overall success in an education program, not just first-year grades, was the criterion against which admissions tests were to be validated. This approach has been changed to reflect the comment of professional testing services that use of first-year grades would be less disruptive of present practice and that periodic validity studies against overall success in the education program would be sufficient check on the reliability of first-year grades.

Section 84.42(b)(3) also requires a recipient to assure itself that admissions tests are selected and administered to applicants with impaired sensory, manual, or speaking skills in such manner as is necessary to avoid unfair distortion of test results. Methods have been developed for testing the aptitude and achievement of persons who are not able to take written tests or even to make the marks required for mechanically scored objective tests; in addition, methods for testing persons with visual or hearing impairments are available. A recipient, under this paragraph, must assure itself that such methods are used with respect to the selection and administration of any admissions tests that it uses.

Section 84.42(b)(3)(iii) has been amended to require that admissions tests be administered in facilities that, on the whole, are accessible. In this context, "on the whole" means that not all of the facilities need be accessible so long as a sufficient number of facilities are available to handicapped persons.

Revised § 84.42(b)(4) generally prohibits preadmission inquiries as to whether an applicant has a handicap. The considerations that led to this revision are similar to those underlying the comparable revision of § 84.14 on preemployment inquiries. The regulation does, however, allow inquiries to be made, after admission but before enrollment, as to handicaps that may require accommodation.

New paragraph (c) parallels the section on preemployment inquiries and allows postsecondary institutions to inquire about applicants' handicaps before admission, subject to certain safeguards, if the purpose of the inquiry is to take remedial action to correct past discrimination or to take voluntary action to overcome the limited participation of handicapped persons in postsecondary educational institutions.

Proposed § 84.42(c), which would have allowed different admissions criteria in certain cases for handicapped persons, was widely misinterpreted in comments from both handicapped persons and recipients. We have concluded that the section is unnecessary, and it has been deleted.

30. *Treatment of students.* Section 84.43 contains general provisions prohibiting the discriminatory treatment of qualified handicapped applicants. Paragraph (b) requires recipients to ensure that equal opportunities are provided to its handicapped students in education programs and activities that are not operated by the recipient. The recipient must be satisfied that the outside education program or activity as a whole is nondiscriminatory. For example, a college must ensure that discrimination on the basis of handicap does not occur in connection with teaching assignments of student teachers in elementary or secondary schools not operated by the college. Under the "as a whole" wording, the college could continue to use elementary or secondary school systems that discriminate if, and only if, the college's student teaching program, when viewed in its entirety, offered handicapped student teachers the same range and quality of choice in student teaching assignments afforded nonhandicapped students.

Paragraph (c) of this section prohibits a recipient from excluding qualified handicapped students from any course, course of study, or other part of its education program or activity. This paragraph is designed to eliminate the practice of excluding handicapped persons from specific courses and from areas of concentration because of factors such as ambulatory difficulties of the student or assumptions by the recipient that no job would be available in the area in question for a person with that handicap.

New paragraph (d) requires postsecondary institutions to operate their programs and activities so that handicapped students are provided services in the most integrated setting appropriate. Thus, if a college had several elementary physics classes and had moved one such class to the first floor of the science building to accommodate students in wheelchairs, it would be a violation of this paragraph for the college to concentrate handicapped students with no mobility impairments in the same class.

31. *Academic adjustments.* Paragraph (a) of § 84.44 requires that a recipient make certain adjustments to academic requirements and practices that discriminate or have the effect of discriminating on the basis of handicap. This requirement, like its predecessor in the proposed regulation, does not obligate an institution to waive course or other academic requirements. But such institutions must accommodate those requirements to the needs of individual handicapped students. For example, an institution might permit an otherwise qualified handicapped student who is deaf to substitute an art appreciation or music history course for a required course in music appreciation or could modify the manner in which the music appreciation course is conducted for the deaf student. It should be stressed that academic requirements that can be demonstrated by the recipient to be essential to its program of instruction or to particular degrees need not be changed.

Paragraph (b) provides that postsecondary institutions may not impose rules that have the effect of limiting the participation of handicapped students in the education program. Such rules include prohibition of tape recorders or braillers in classrooms and dog guides in campus buildings. Several recipients expressed concern about allowing students to tape record lectures because the professor may later want to copyright the lectures. This problem may be solved by requiring students to sign agreements that they will not release the tape recording or transcription or otherwise hinder the professor's ability to obtain a copyright.

Paragraph (c) of this section, concerning the administration of course examinations to students with impaired sensory, manual, or speaking skills, parallels the regulation's provisions on admissions testing (§ 84.42(b)) and will be similarly interpreted.

Under § 84.44(d), a recipient must ensure that no handicapped student is subject to discrimination in the recipient's program because of the absence of necessary auxiliary educational aids. Colleges and universities expressed concern about the costs of compliance with this provision.

The Department emphasizes that recipients can usually meet this obligation by assisting students in using existing resources for auxiliary aids such as state vocational rehabilitation agencies and private charitable organizations. Indeed, the Department anticipates that the bulk of auxiliary aids will be paid for by state and private agencies, not by colleges or universities. In those circumstances where the recipient institution must provide the educational auxiliary aid, the institution has flexibility in choosing the methods by which the aids will be supplied. For example, some universities have used students to work with the institution's handicapped students. Other institutions have used existing private agencies that tape texts for handicapped students free of charge in order to reduce the number of readers needed for visually impaired students.

As long as no handicapped person is excluded from a program because of the lack of an appropriate aid, the recipient need not have all such aids on hand at all times. Thus, readers need not be available in the recipient's library at all times so long as the schedule of times when a reader is available is established, is adhered to, and is sufficient. Of course, recipients are not required to maintain a complete braille library.

32. *Housing.* Section 84.45(a) requires postsecondary institutions to provide housing to handicapped students at the same cost as they provide it to other students and in a convenient, accessible, and comparable manner. Commenters, particularly blind persons, pointed out that some handicapped persons can live in any college housing and need not wait to the end of the transition period in Subpart C to be offered the same variety and scope of housing accommodations given to nonhandicapped persons. The Department concurs with this position and will interpret this section accordingly.

A number of colleges and universities reacted negatively to paragraph (b) of this section. It provides that, if a recipient assists in making off-campus housing available to its students, it should develop and implement procedures to assure itself that off-campus housing, as a whole, is available to handicapped students. Since postsecondary institutions are presently required to assure themselves that off-campus housing is provided in a manner that does not discriminate on the basis of sex (§ 86.32 of the title IX regulation), they may use the procedures developed under title IX in order to comply with § 84.45(b). It should be emphasized that not every off-campus living accommodation need be made accessible to handicapped persons.

33. *Health and insurance.* Section 84.46 of the proposed regulation, providing that recipients may not discriminate on the basis of handicap in the provision of health and related services, has been deleted as duplicative of the general provisions of section 84.43. This deletion represents no change in the obligation of recipients to provide nondiscriminatory health and insurance plans. The Department will continue to require that nondiscriminatory health services be provided to handicapped students. Recipients are not required, however, to provide specialized services and aids to handicapped persons in health programs. If, for example, a college infirmary treats only simple disorders such as cuts, bruises, and colds, its obligation to handicapped persons is to treat such disorders for them.

34. *Financial assistance.* Section 84.46(a) (formerly § 84.47), prohibiting discrimination in providing financial assistance, remains substantively the same. It provides that recipients may not provide less assistance to or limit the eligibility of qualified handicapped persons for such assistance, whether the assistance is provided directly by the recipient or by another entity through the recipient's sponsorship. Awards that are made under wills, trusts, or similar legal instruments in a discriminatory manner are permissible, but only if the overall effect of the recipient's provision of financial assistance is not discriminatory on the basis of handicap.

It will not be considered discriminatory to deny, on the basis of handicap, an athletic scholarship to a handicapped person if the handicap renders the person unable to qualify for the award. For example, a student who has a neurological disorder might be denied a varsity football scholarship on the basis of his inability to play football, but a deaf person could not, on the basis of handicap, be denied a scholarship for the school's diving team. The deaf person could, however, be denied a scholarship on the basis of comparative diving ability.

Commenters on § 84.46(b), which applies to assistance in obtaining outside employment for students, expressed similar concerns to those raised under § 84.43(b), concerning cooperative programs. This paragraph has been changed in the same manner as § 84.43(b) to include the "as a whole" concept and will be interpreted in the same manner as § 84.43(b).

35. *Nonacademic services.* Section 84.47 (formerly § 84.48) establishes nondiscrimination standards for physical education and athletics counseling and placement services, and social organizations. This section sets the same standards as does § 84.37 of Subpart D, discussed above, and will be interpreted in a similar fashion.

SUBPART F—HEALTH, WELFARE, AND SOCIAL SERVICES

Subpart F applies to recipients that operate health, welfare, and social service programs. The Department received fewer comments on this subpart than on others.

Although many commented that Subpart F lacked specificity, these commenters provided neither concrete suggestions nor additions. Nevertheless, some changes have been made, pursuant to comment, to clarify the obligations of recipients in specific areas. In addition, in an effort to reduce duplication in the regulation, the section governing recipients providing health services (proposed § 84.52) has been consolidated with the section regulating providers of welfare and social services (proposed §84.53). Since the separate provisions that appeared in the proposed regulation were almost identical, no substantive change should be inferred from their consolidation.

Several commenters asked whether Subpart F applies to vocational rehabilitation agencies whose purpose is to assist in the rehabilitation of handicapped persons. To the extent that such agencies receive financial assistance from the Department, they are covered by Subpart F and all other relevant subparts of the regulation. Nothing in this regulation, however, precludes such agencies from servicing only handicapped persons. Indeed, § 84.4(c) permits recipients to offer services or benefits that are limited by federal law to handicapped persons or classes of handicapped persons.

Many comments suggested requiring state health, welfare, and social service agencies to take an active role in the enforcement of section 504 with regard to local health and social service providers. The Department believes that the possibility for federal-state cooperation in the administration and enforcement of section 504 warrants further consideration. Moreover, the Department will rely largely on state Medicaid agencies, as it has under title VI, for monitoring compliance by individual Medicaid providers.

A number of comments also discussed whether section 504 should be read to require payment of compensation to institutionalized handicapped patients who perform services for the institution in which they reside. The Department of Labor has recently issued a proposed regulation under the Fair Labor Standards Act (FLSA) that covers the question of compensation for institutionalized persons. 42 FR 15224 (March 18, 1977). This Department will seek information and comment from the Department of Labor concerning that agency's experience administering the FLSA regulation.

36. *Health, welfare, and other social service providers.* As already noted, § 84.52 has been combined with proposed § 84.53 into a single section covering health, welfare, and other social services. Section 84.52(a) has been expanded in several respects. The addition of new paragraph (a)(2) is intended to make clear the basic requirement of equal opportunity to receive benefits or services in the health, welfare, and social service areas. The paragraph parallels §§ 84.4(b)(ii) and 84.43(b). New paragraph (a)(3) requires the provision of effective benefits or services, as defined in § 84.4(b)(2) (i.e., benefits or services which "afford handicapped persons equal opportunity to obtain the same result (or) to gain the same benefit * * *").

Section 84.52(a) also includes provisions concerning the limitation of benefits or services to handicapped persons and the subjection of handicapped persons to different eligibility standards. (These provisions were previously included in the welfare recipient section (§ 84.53(a)).) One common misconception about the regulation is that it would require specialized hospitals and other health care providers to treat all handicapped persons. The regulation makes no such requirement. Thus, a burn treatment center need not provide other types of medical treatment to handicapped persons unless it provides such medical services to nonhandicapped persons. It could not, however, refuse to treat the burns of a deaf person because of his or her deafness.

Commenters had raised the question of whether the prohibition against different standards of eligibility might preclude recipients from providing special services to handicapped persons or classes of handicapped persons. The regulation will not be so interpreted, and the specific section in question has been eliminated. Section 84.4(c) makes clear that special programs for handicapped persons are permitted.

A new paragraph (a)(5) concerning the provision of different or separate services or benefits has been added. This provision prohibits such treatment unless necessary to provide qualified handicapped persons with benefits and services that are as effective as those provided to others.

Section 84.52(a)(2) of the proposed regulation has been omitted as duplicative of revised § 84.22 (b) and (c) in Subpart C. As discussed above, these sections permit health care providers to arrange to meet patients in accessible facilities and to make referrals in carefully limited circumstances.

Section 84.52(a)(3) of the proposed regulation has been redesignated § 84.52(b) and has been amended to cover written material concerning waivers of rights or consent to treatment as well as general notices concerning health benefits or services. The section requires the recipient to ensure that qualified handicapped persons are not denied effective notice because of their handicap. For Example, recipients could use several different types of notice in order to reach persons with impaired vision or hearing, such as brailled messages, radio spots, and tactile devices on cards or envelopes to inform blind persons of the need to call the recipient for further information.

Sections 84.52(a)(4), 84.52(a)(5), and 84.52(b) have been omitted from the regulation as unnecessary. They are clearly comprehended by the more general sections banning discrimination.

Section 84.52(c) is a new section requiring recipient hospitals to establish a procedure for effective communication with persons with impaired hearing for the purpose of providing emergency health care. Although it would be appropriate for a hospital to fulfill its responsibilities under this section by having a full-time interpreter for the deaf on staff, there may be other means of accomplishing the desired result of assuring that some means of communication is immediately available for deaf persons needing emergency treatment.

Section 84.52(d), also a new provision, requires recipients with fifteen or more employees to provide appropriate auxiliary aids for persons with impaired sensory, manual, or speaking skills. Further, the Director may require a small provider to furnish auxiliary aids where the provision of aids would not adversely affect the ability of the recipient to provide its health benefits or services. Thus, although a small nonprofit neighborhood clinic might not be obligated to have available an interpreter for deaf persons, the Director may require provision of such aids as may be reasonably available to ensure that qualified handicapped persons are not denied appropriate benefits or services because of their handicaps.

37. *Treatment of Drug Addicts and Alcoholics.* Section 84.53 is a new section that prohibits discrimination in the treatment and admission of drug and alcohol addicts to hospitals and outpatient facilities. This section is included pursuant to section 407, Public Law 92-255, the Drug Abuse Office and Treatment Act of 1972 (21 U.S.C. 1174), as amended, and section 321, Public Law 91-616, the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970 (42 U.S.C. 4581), as amended, and section 321, Public Law 93-282. Section 504 itself also prohibits such discriminatory treatment and, in addition, prohibits similar discriminatory treatment by other types of health providers. Section 84.53 prohibits discrimination against drug abusers by operators of outpatient facilities, despite the fact that section 407 pertains only to hospitals, because of the broader application of section 504. This provision does not mean that all hospitals and outpatient facilities must treat drug addiction and alcoholism. It simply means, for example, that a cancer clinic may not refuse to treat cancer patients simply because they are also alcoholics.

38. *Education of institutionalized persons.* The regulation retains § 84.54 of the proposed regulation that requires that an appropriate education be provided to qualified handicapped persons who are confined to residential institutions or day care centers.

SUBPART G—PROCEDURES

In § 84.61, the Secretary has adopted the title VI complaint and enforcement procedures for use in implementing section 504 until such time as they are superseded by the issuance of a consolidated procedural regulation applicable to all of the civil rights statutes and executive orders administered by the Department.

APPENDIX B—ENFORCEMENT PROCEDURES

Sections 80.6-80.10 and Part 81 of Title 45 of the Code of Federal Regulations are reprinted here without change for the convenience of the reader:

§ 80.6 Compliance information.

(a) *Cooperation and assistance.* The responsible Department official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.

(b) *Compliance reports.* Each recipient shall keep such records and submit to the responsible Department official or his designee timely, complete and accurate compliance reports at such times, and in such form and containing such information, as the responsible Department official or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this part. For example, recipients should have available for the Department racial and ethnic data showing the extent to which members of minority groups are beneficiaries of and participants in federally-assisted programs. In the case of any program under which a primary recipient extends Federal financial assistance to any other recipient, such other recipient shall also submit such compliance reports to the primary recipient as may be necessary to enable the primary recipient to carry out its obligations under this part.

(c) *Access to sources of information.* Each recipient shall permit access by the responsible Department official or his designee during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this part. Where any information required of a recipient is in the exclusive possession of any other agency, institution or person and this agency, institution or person shall fail or refuse to furnish this information the recipient shall so certify in its report and shall set forth what efforts it has made to obtain the information. Asserted considerations of privacy or confidentiality may not operate to bar the Department from evaluating or seeking to enforce compliance with this Part. Information of a confidential nature obtained in connection with compliance evaluation or enforcement shall not be disclosed except where necessary in formal enforcement proceedings or where otherwise required by law.

(d) *Information to beneficiaries and participants.* Each recipient shall make available to participants, beneficiaries, and other interested persons such information regarding the provisions of this regulation and its applicability to the program for which the recipient receives Federal financial assistance, and make such information available to them in such manner, as the responsible Department official finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this regulation.

(Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1) [29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14555, Oct. 19, 1967; 38 FR 17982, 17983, July 5, 1973]

§ 80.7 Conduct of investigations.

(a) *Periodic compliance reviews.* The responsible Department official or his designee shall from time to time review the practices of recipients to determine whether they are complying with this part.

(b) *Complaints.* Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this part may by himself or by a representative file with the responsible Department official or his designee a written complaint. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the responsible Department official or his designee.

(c) *Investigations.* The responsible Department official or his designee will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part. The investigation should include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination as to whether the recipient has failed to comply with this part.

(d) *Resolution of matters.* (1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the responsible Department official or his designee will so inform the recipient and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided for in § 80.8.

(2) If an investigation does not warrant action pursuant to subparagraph (1) of this paragraph the responsible Department official or his designee will so inform the recipient and the complainant, if any, in writing.

(e) *Intimidatory or retaliatory acts prohibited.* No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part. The identity of complainants shall be kept confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

(Sec. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1) [29 FR 16298, Dec. 4, 1964, as amended at 38 FR 17982, 17983, July 5, 1973]

§ 80.8 Procedure for effecting compliance.

(a) *General.* If there appears to be a failure or threatened failure to comply with this regulation, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law. Such other means may include, but are not limited to, (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law.

(b) *Noncompliance with § 80.4.* If an applicant fails or refuses to furnish an assurance required under § 80.4 or otherwise fails or refuses to comply with a requirement imposed by or pursuant to that section Federal financial assistance may be refused in accordance with the procedures of paragraph (c) of this section. The Department shall not be required to provide assistance in such a case during the pendency of the administrative proceedings under such paragraph except that the Department shall continue assistance during the pendency of such proceedings where such assistance is due and payable pursuant to an application therefor approved prior to the effective date of this part.

(c) *Termination of or refusal to grant or to continue Federal financial assistance.* No order suspending, terminating or refusing to grant or continue Federal financial assistance shall become effective until (1) the responsible Department official has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by voluntary means, (2) there has been an express finding on the record, after opportunity for hearing, of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this part, (3) the expiration of 30 days after the Secretary has filed with the committee of the House and the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action. Any action to suspend or terminate or to refuse to grant or to continue Federal financial assistance shall be limited to the particular political entity, or part thereof, or other applicant or recipient as to whom such a finding has been made and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.

(d) *Other means authorized by law.* No action to effect compliance by any other means authorized by law shall be taken until (1) the responsible Department official has determined that compliance cannot be secured by voluntary means, (2) the recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance, and (3) the expiration of at least 10 days from the mailing of such notice to the recipient or other person. During this period of at least 10 days additional efforts shall be made to persuade the recipient or other person to comply with the regulation and to take such corrective action as may be appropriate.

(Secs. 601, 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d, 2000d-1; Sec. 182, 80 Stat. 1209; 42 U.S.C. 2000d-5) (29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14555, Oct. 19, 1967; 38 FR 17982, July 5, 1973)

§ 80.9 Hearings.

(a) *Opportunity for hearing.* Whenever an opportunity for a hearing is required by § 80.8(c), reasonable notice shall be given by registered or certified mail, return receipt requested, to the affected applicant or recipient. This notice shall advise the applicant or recipient of the action proposed to be taken, the specific provision under which the proposed action against it is to be taken, and the matters of fact or law asserted as the basis for this action, and either (1) fix a date not less than 20 days after the date of such notice within which the applicant or recipient may request of the responsible Department official that the matter be scheduled for hearing or (2) advise the applicant or recipient that the matter in question has been set down for hearing at a stated place and time. The time and place so fixed shall be reasonable and shall be subject to change for cause. The complainant, if any, shall be advised of the time and place of the hearing. An applicant or recipient may waive a hearing and submit written information and argument for the record. The failure of an applicant or recipient to request a hearing for which a date has been set shall be deemed to be a waiver of the right to a hearing under section 602 of the Act and § 80.8(c) of this regulation and consent to the making of a decision on the basis of such information as may be filed as the record.

(b) *Time and place of hearing.* Hearings shall be held at the offices of the Department in Washington, D.C., at a time fixed by the responsible Department official unless he determines that the convenience of the applicant or recipient or of the Department requires that another place be selected. Hearings shall be held before a hearing examiner designated in accordance with 5 U.S.C. 3105 and 3344 (section 11 of the Administrative Procedure Act).

(c) *Right to counsel.* In all proceedings under this section, the applicant or recipient and the Department shall have the right to be represented by counsel.

(d) *Procedures, evidence, and record.* (1) The hearing, decision, and any administrative review thereof shall be conducted in conformity with sections 5-8 of the Administrative Procedure Act, and in accordance with such rules of procedure as are proper (and not inconsistent with this section) relating to the conduct of the hearing, giving of notices subsequent to those provided for in paragraph (a) of this section, taking of testimony, exhibits, arguments and briefs, requests for findings, and other related matters. Both the Department and the applicant or recipient shall be entitled to introduce all relevant evidence on the issues as stated in the notice for hearing or as determined by the officer conducting the hearing at the outset of or during the hearing. Any person (other than a Government employee considered to be on official business) who, having been invited or requested to appear and testify as a witness on the Government's behalf, attends at a time and place scheduled for a hearing provided for by this part, may be reimbursed for his travel and actual expenses of attendance in an amount not to exceed the amount payable under the standardized travel regulations to a Government employee traveling on official business.

(2) Technical rules of evidence shall not apply to hearings conducted pursuant to this part, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where reasonably necessary by the officer conducting the hearing. The hearing officer may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for the record shall be open to examination by the parties and opportunity shall be given to refute facts and arguments advanced on either side of the issues. A transcript shall be made of the oral evidence except to the extent the substance thereof is stipulated for the record. All decisions shall be based upon the hearing record and written findings shall be made.

(e) *Consolidated or joint hearings.* In cases in which the same or related facts are asserted to constitute noncompliance with this regulation with respect to two or more programs to which this part applies, or noncompliance with this part and the regulations of one or more other Federal departments or agencies issued under Title VI of the Act, the responsible Department official may, by agreement with such other departments or agencies where applicable, provide for the conduct of consolidated or joint hearings, and for the application to such hearings of rules of procedure not inconsistent with this part. Final decisions in such cases, insofar as this regulation is concerned, shall be made in accordance with § 80.10.

(Sec. 602 Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d-1) (29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14555, Oct. 19, 1967; 38 FR 17982, 17983, July 5, 1973)

§ 80.10 Decisions and notices.

(a) *Decision by hearing examiner.* After a hearing is held by a hearing examiner such hearing examiner shall either make an initial decision, if so authorized, or certify the entire record including his recommended findings and proposed decision to the reviewing authority for a final decision, and a copy of such initial decision or certification shall be mailed to the applicant or recipient and to the complainant, if any. Where the initial decision referred to in this paragraph or in paragraph (c) of this section is made by the hearing examiner, the applicant or recipient or the counsel for the Department may, within the period provided for in the rules of procedure issued by the responsible Department official, file with the reviewing authority exceptions to the initial decision, with his reasons therefor. Upon the filing of such exceptions the reviewing authority shall review the initial decision and issue its own decision thereof including the reasons therefor. In the absence of exceptions the initial decision shall constitute the final decision, subject to the provisions of paragraph (e) of this section.

(b) *Decisions on record or review by the reviewing authority.* Whenever a record is certified to the reviewing authority for decision or it reviews the decision of a hearing examiner pursuant to paragraph (a) or (c) of this section, the applicant or recipient shall be given reasonable opportunity to file with it briefs or other written statements of its contentions, and a copy of the final decision of the reviewing authority shall be given in writing to the applicant or recipient and to the complainant, if any.

(c) *Decisions on record where a hearing is waived.* Whenever a hearing is waived pursuant to § 80.9(a) the reviewing authority shall make its final decision on the record or refer the matter to a hearing examiner for an initial decision to be made on the record. A copy of such decision shall be given in writing to the applicant or recipient, and to the complainant, if any.

(d) *Rulings required.* Each decision of a hearing examiner or reviewing authority shall set forth a ruling on each finding, conclusion, or exception presented, and shall identify the requirement or requirements imposed by or pursuant to this part with which it is found that the applicant or recipient has failed to comply.

(e) *Review in certain cases by the Secretary.* If the Secretary has not personally made the final decision referred to in paragraphs (a), (b), or (c) of this section, a recipient or applicant or the counsel for the Department may request the Secretary to review a decision of the Reviewing Authority in accordance with rules of procedure issued by the responsible Department official. Such review is not a matter of right and shall be granted only where the Secretary determines there are special and important reasons therefor. The Secretary may grant or deny such request, in whole or in part. He may also review such a decision upon his own motion in accordance with rules of procedure issued by the responsible Department official. In the absence of a review under this paragraph, a final decision referred to in paragraphs (a), (b), (c) of this section shall become the final decision of the Department when the Secretary transmits it as such to Congressional committees with the report required under section 602 of the Act. Failure of an applicant or recipient to file an exception with the Reviewing Authority or to request review under this paragraph shall not be deemed a failure to exhaust administrative remedies for the purpose of obtaining judicial review.

(f) *Content of orders.* The final decision may provide for suspension or termination of, or refusal to grant or continue Federal financial assistance, in whole or in part, to which this regulation applies, and may contain such terms, conditions, and other provisions as are consistent with and will effectuate the purposes of the Act and this regulation, including provisions designed to assure that no Federal financial assistance to which this regulation applies will thereafter be extended under such law or laws to the applicant or recipient determined by such decision to be in default in its performance of an assurance given by it pursuant to this regulation, or to have otherwise failed to comply with this regulation unless and until it corrects its noncompliance and satisfies the responsible Department official that it will fully comply with this regulation.

(g) *Post-termination proceedings.* (1) An applicant or recipient adversely affected by an order issued under paragraph (f) of this section shall be restored to full eligibility to receive Federal financial assistance if it satisfies the terms and conditions of that order for such eligibility or if it brings itself into compliance with this part and provides reasonable assurance that it will fully comply with this part. An elementary or secondary school or school system which is unable to file an assurance of compliance with § 80.3 shall be restored to full eligibility to receive Federal financial assistance, if it files a court order or a plan for desegregation which meets the requirements of § 80.4(c), and provides reasonable assurance that it will comply with the court order or plan.

(2) Any applicant or recipient adversely affected by an order entered pursuant to paragraph (f) of this section may at any time request the responsible Department official to restore fully its eligibility to receive Federal financial assistance. Any such request shall be supported by information showing that the applicant or recipient has met the requirements of subparagraph (1) of this paragraph. If the responsible Department official determines that those requirements have been satisfied, he shall restore such eligibility.

(3) If the responsible Department official denies any such request, the applicant or recipient may submit a request for a hearing in writing, specifying why it believes such official to have been in error. It shall thereupon be given an expeditious hearing, with a decision on the record, in accordance with rules of procedure issued by the responsible Department official. The applicant or recipient will be restored to such eligibility if it proves at such a hearing that it satisfied the requirements of subparagraph (1) of this paragraph. While proceedings under this paragraph are pending, the sanctions imposed by the order issued under paragraph (f) of this section shall remain in effect.

(Sec. 602, Civil Rights Act of 1964; 78 Stat. 252; 42 U.S.C. 2000d-1) [29 FR 16298, Dec. 4, 1964, as amended at 32 FR 14556, Oct. 19, 1967; 38 FR 17983, 17984, July 5, 1973]

PART 81—PRACTICE AND PROCEDURE FOR HEARINGS UNDER PART 80 OF THIS TITLE

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AUTHORITY: The provisions of this Part 81 are issued under 5 U.S.C. 301 and 45 CFR 80.8(c).

SOURCE: The provisions of this Part 81 appear at 32 F.R. 15120, Nov. 3, 1967, unless otherwise noted.

Subpart A—General Information

§ 81.1 Scope of rules.

The rules of procedure in this part supplement §§ 80.8 and 80.10 of this subtitle and govern the practice for hearings, decisions, and administrative review conducted by the Department of Health, Education, and Welfare, pursuant to Title VI of the Civil Rights Act of 1964 (sec. 602, 78 Stat. 252) and Part 80 of this subtitle.

§ 81.2 Records to be public.

All pleadings, correspondence, exhibits, transcripts of testimony, exceptions, briefs, decisions, and other documents filed in the docket in any proceeding may be inspected and copied in the office of the Civil Rights hearing clerk. Inquiries may be made at the Central Information Center, Department of Health, Education, and Welfare, 330 Independence Avenue SW., Washington, D.C. 20201.

§ 81.3 Use of gender and number.

As used in this part, words importing the singular number may extend and be applied to several persons or things, and vice versa. Words importing the masculine gender may be applied to females or organizations.

§ 81.4 Suspension of rules.

Upon notice to all parties, the reviewing authority or the presiding officer, with respect to matters pending before them, may modify or waive any rule in this part upon determination that no party will be unduly prejudiced and the ends of justice will thereby be served.

Subpart B—Appearance and Practice

§ 81.11 Appearance.

A party may appear in person or by counsel and participate fully in any proceeding. A State agency or a corporation may appear by any of its officers or by any employee it authorizes to appear on its behalf. Counsel must be members in good standing of the bar of a State, Territory, or possession of the United States or of the District of Columbia or the Commonwealth of Puerto Rico.

§ 81.12 Authority for representation.

Any individual acting in a representative capacity in any proceeding may be required to show his authority to act in such capacity.

§ 81.15 Exclusion from hearing for misconduct.

Disrespectful, disorderly, or contumacious language or contemptuous conduct, refusal to comply with directions, or continued use of dilatory tactics by any person at any hearing before a presiding officer shall constitute grounds for immediate exclusion of such person from the hearing by the presiding officer.

Subpart C—Parties

§ 81.21 Parties; General Counsel deemed a party.

(a) The term party shall include an applicant or recipient or other person to whom a notice of hearing or opportunity for hearing has been mailed naming him as respondent.

(b) The General Counsel of the Department of Health, Education, and Welfare shall be deemed a party to all proceedings.

§ 81.22 Amici curiae.

(a) Any interested person or organization may file a petition to participate in a proceeding as an amicus curiae. Such petition shall be filed prior to the prehearing conference, or if none is held, before the commencement of the hearing, unless the petitioner shows good cause for filing the petition later. The presiding officer may grant the petition if he finds that the petitioner has a legitimate interest in the proceedings, that such participation will not unduly delay the outcome, and may contribute materially to the proper disposition thereof. An amicus curiae is not a party and may not introduce evidence at a hearing.

(b) An amicus curiae may submit a statement of position to the presiding officer prior to the beginning of a hearing, and shall serve a copy on each party. The amicus curiae may submit a brief on each occasion a decision is to be made or a prior decision is subject to review. His brief shall be filed and served on each party within the time limits applicable to the party whose position he deems himself to support; or if he does not deem himself to support the position of any party, within the longest time limit applicable to any party at that particular stage of the proceedings.

(c) When all parties have completed their initial examination of a witness, any amicus curiae may request the presiding officer to propound specific questions to the witness. The presiding officer, in his discretion, may grant any such request if he believes the proposed additional testimony may assist materially in elucidating factual matters at issue between the parties and will not expand the issues.

§ 81.23 Complainants not parties.

A person submitting a complaint pursuant to § 80.7(b) of this title is not a party to the proceedings governed by this part, but may petition, after proceedings are initiated, to become an amicus curiae.

Subpart D—Form, Execution, Service and Filing of Documents

§ 81.31 Form of documents to be filed.

Documents to be filed under the rules in this part shall be dated, the original signed in ink, shall show the docket description and title of the proceeding, and shall show the title, if any, and address of the signatory. Copies need not be signed but the name of the person signing the original shall be reproduced. Documents shall be legible and shall not be more than 8½ inches wide and 12 inches long.

§ 81.32 Signature of documents.

The signature of a party, authorized officer, employee or attorney constitutes a certificate that he has read the document, that to the best of his knowledge, information, and belief there is good ground to support it, and that it is not interposed for delay. If a document is not signed or is signed with intent to defeat the purpose of this section, it may be stricken as sham and false and the proceeding may proceed as though the document had not been filed. Similar action may be taken if scandalous or indecent matter is inserted.

§ 81.33 Filing and service.

All notices by a Department official, and all written motions, requests, petitions, memoranda, pleadings, exceptions, briefs, decisions, and correspondence to a Department official from a party, or vice versa, relating to a proceeding after its commencement shall be filed and served on all parties. Parties shall supply the original and two copies of documents submitted for filing. Filings shall be made with the Civil Rights hearing clerk at the address stated in the notice of hearing or notice of opportunity for hearing, during regular business hours. Regular business hours are every Monday through Friday (legal holidays in the District of Columbia excepted) from 9 a.m. to 5:30 p.m., eastern standard or daylight saving time, whichever is effective in the District of Columbia at the time. Originals only of exhibits and transcripts of testimony need be filed. For requirements of service on amici curiae, see § 81.22(b).

§ 81.34 Service—how made.

Service shall be made by personal delivery of one copy to each person to be served or by mailing by first-class mail, properly addressed with postage prepaid. When a party or amicus has appeared by attorney or other representative, service upon such attorney or representative will be deemed service upon the party or amicus. Documents served by mail preferably should be mailed in sufficient time to reach the addressee by the date on which the original is due to be filed, and should be air mailed if the addressee is more than 300 miles distant.

§ 81.35 Date of service.

The date of service shall be the day when the matter is deposited in the U.S. mail or is delivered in person, except that the date of service of the initial notice of hearing or opportunity for hearing shall be the date of its delivery, or of its attempted delivery if refused.

§ 81.36 Certificate of service.

The original of every document filed and required to be served upon parties to a proceeding shall be endorsed with a certificate of service signed by the party making service or by his attorney or representative, stating that such service has been made, the date of service, and the manner of service, whether by mail or personal delivery.

Subpart E—Time

§ 81.41 Computation.

In computing any period of time under the rules in this part or in an order issued hereunder, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed in the District of Columbia, in which event it includes the next following business day. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded from the computation.

§ 81.42 Extension of time or postponement.

Requests for extension of time should be served on all parties and should set forth the reasons for the application. Applications may be granted upon a showing of good cause by the applicant. From the designation of a presiding officer until the issuance of his decision such requests should be addressed to him. Answers to such requests are permitted, if made promptly.

§ 81.43 Reduction of time to file documents.

For good cause, the reviewing authority or the presiding officer, with respect to matters pending before them, may reduce any time limit prescribed by the rules in this part, except as provided by law or in Part 80 of this title.

Subpart F—Proceedings Prior to Hearing

§ 81.51 Notice of hearing or opportunity for hearing.

Proceedings are commenced by mailing a notice of hearing or opportunity for hearing to an affected applicant or recipient, pursuant to § 80.8 of this title.

§ 81.52 Answer to notice.

The respondent, applicant or recipient may file an answer to the notice within 20 days after service thereof. Answers shall admit or deny specifically and in detail each allegation of the notice, unless the respondent party is without knowledge, in which case his answer should so state, and the statement will be deemed a denial. Allegations of fact in the notice not denied or controverted by answer shall be deemed admitted.

Matters alleged as affirmative defenses shall be separately stated and numbered. Failure of the respondent to file an answer within the 20-day period following service of the notice may be deemed an admission of all matters of fact recited in the notice.

§ 81.33 *Amendment of notice or answer.*

The General Counsel may amend the notice of hearing or opportunity for hearing once as a matter of course before an answer thereto is served, and each respondent may amend his answer once as a matter of course not later than 10 days before the date fixed for hearing but in no event later than 20 days from the date of service of his original answer. Otherwise a notice or answer may be amended only by leave of the presiding officer. A respondent shall file his answer to an amended notice within the time remaining for filing the answer to the original notice or within 10 days after service of the amended notice, whichever period may be the longer, unless the presiding officer otherwise orders.

§ 81.34 Request for hearing.

Within 20 days after service of a notice of opportunity for hearing which does not fix a date for hearing the respondent, either in his answer or in a separate document, may request a hearing. Failure of the respondent to request a hearing shall be deemed a waiver of the right to a hearing and to constitute his consent to the making of a decision on the basis of such information as is available.

§ 81.35 Consolidation.

The responsible Department official may provide for proceedings in the Department to be joined or consolidated for hearing with proceedings in other Federal departments or agencies, by agreement with such other departments or agencies. All parties to any proceeding consolidated subsequently to service of the notice of hearing or opportunity for hearing shall be promptly served with notice of such consolidation.

§ 81.36 Motions.

Motions and petitions shall state the relief sought, the authority relied upon, and the facts alleged. If made before or after the hearing, these matters shall be in writing. If made at the hearing, they may be stated orally; but the presiding officer may require that they be reduced to writing and filed and served on all parties in the same manner as a formal motion. Motions, answers, and replies shall be addressed to the presiding officer, if the case is pending before him. A repetitious motion will not be entertained.

§ 81.37 Responses to motions and petitions.

Within 8 days after a written motion or petition is served, or such other period as the reviewing authority or the presiding officer may fix, any party may file a response thereto. An immediate oral response may be made to an oral motion.

§ 81.38 Disposition of motions and petitions.

The reviewing authority or the presiding officer may not sustain or grant a written motion or petition prior to expiration of the time for filing responses thereto, but may overrule or deny such motion or petition without awaiting response: *Provided, however,* That prehearing conferences, hearings and decisions need not be delayed pending disposition of motions or petitions. Oral motions and petitions may be ruled on immediately. Motions and petitions submitted to the reviewing authority or the presiding officer, respectively, and not disposed of in separate rulings or in their respective decisions will be deemed denied. Oral arguments shall not be held on written motions or petitions unless the presiding officer in his discretion expressly so orders.

Subpart C—Responsibilities and Duties of Presiding Officer

§ 81.41 Who presides.

A hearing examiner assigned under 5 U.S.C. 3105 or 3344 (formerly sec. 11 of the Administrative Procedure Act) shall preside over the taking of evidence in any hearing to which these rules of procedure apply.

§ 81.42 Designation of hearing examiner.

The designation of the hearing examiner as presiding officer shall be in writing, and shall specify whether the examiner is to make an initial decision or to certify the entire record including his recommended findings and proposed decision to the reviewing authority, and may also fix the time and place of hearing. A copy of such order shall be served on all parties. After service of an order designating a hearing examiner to preside, and until such examiner makes his decision, motions and petitions shall be submitted to him. In the case of the death, illness, disqualification or unavailability of the designated hearing examiner, another hearing examiner may be designated to take his place.

§ 81.43 Authority of presiding officer.

The presiding officer shall have the duty to conduct a fair hearing, to take all necessary action to avoid delay, and to maintain order. He shall have all powers necessary to these ends, including (but not limited to) the power to:

(a) Arrange and issue notice of the date, time, and place of hearings, or, upon due notice to the parties, to change the date, time, and place of hearings previously set.

(b) Hold conferences to settle, simplify, or fix the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding.

(c) Require parties and amici curiae to state their position with respect to the various issues in the proceeding.

(d) Administer oaths and affirmations.

(e) Rule on motions, and other procedural items on matters pending before him.

(f) Regulate the course of the hearing and conduct of counsel therein.

(g) Examine witnesses and direct witnesses to testify.

(h) Receive, rule on, exclude or limit evidence.

(i) Fix the time for filing motions, petitions, briefs, or other items in matters pending before him.

(j) Issue initial or recommended decisions.

(k) Take any action authorized by the rules in this part or in conformance with the provisions of 5 U.S.C. 551-559 (the Administrative Procedure Act).

Subpart H—Hearing Procedures

§ 81.71 Statement of position and trial briefs.

The presiding officer may require parties and amici curiae to file written statements of position prior to the beginning of a hearing. The presiding officer may also require the parties to submit trial briefs.

§ 81.72 Evidentiary purpose.

(a) The hearing is directed to receiving factual evidence and expert opinion testimony related to the issues in the proceeding. Argument will not be received in evidence; rather it should be presented in statements, memoranda, or briefs, as determined by the presiding officer. Brief opening statements, which shall be limited to statement of the party's position and what he intends to prove, may be made at hearings.

(b) Hearings for the reception of evidence will be held only in cases where issues of fact must be resolved in order to determine whether the respondent has failed to comply with one or more applicable requirements of Part 80 of this title. In any case where it appears from the respondent's answer to the notice of hearing or opportunity for hearing, from his failure timely to answer, or from his admissions or stipulations in the record, that there are no matters of material fact in dispute, the reviewing authority or presiding officer may enter an order so finding, vacating the hearing date if one has been set, and fixing the time for filing briefs under § 81.101. Thereafter the proceedings shall go to conclusion in accordance with Subpart J of this part. The presiding officer may allow an appeal from such order in accordance with § 81.86.

§ 81.73 Testimony.

Testimony shall be given orally under oath or affirmation by witnesses at the hearing; but the presiding officer, in his discretion, may require or permit that the direct testimony of any witness be prepared in writing and served on all parties in advance of the hearing. Such testimony may be adopted by the witness at the hearing, and filed as part of the record thereof. Unless authorized by the presiding officer, witnesses will not be permitted to read prepared testimony into the record. Except as provided in §§ 81.75 and 81.76, witnesses shall be available at the hearing for cross-examination.

§ 81.74 Exhibits.

Proposed exhibits shall be exchanged at the prehearing conference, or otherwise prior to the hearing if the presiding officer so requires. Proposed exhibits not so exchanged may be denied admission as evidence. The authenticity of all proposed exhibits exchanged prior to hearing will be deemed admitted unless written objection thereto is filed prior to the hearing or unless good cause is shown at the hearing for failure to file such written objection.

§ 81.75 Affidavits.

An affidavit is not inadmissible as such. Unless the presiding officer fixes other time periods affidavits shall be filed and served on the parties not later than 15 days prior to the hearing; and not less than 7 days prior to hearing a party may file and serve written objection to any affidavit on the ground that he believes it necessary to test the truth of assertions therein at hearing. In such event the assertions objected to will not be received in evidence unless the affiant is made available for cross-examination, or the presiding officer determines that cross-examination is not necessary for the full and true disclosure of facts referred to in such assertions. Notwithstanding any objection, however, affidavits may be considered in the case of any respondent who waives a hearing.

§ 81.76 Depositions.

Upon such terms as may be just, for the convenience of the parties or of the Department, the presiding officer may authorize or direct the testimony of any witness to be taken by deposition.

§ 81.77 Admissions as to facts and documents.

Not later than 15 days prior to the scheduled date of the hearing except for good cause shown, or prior to such earlier date as the presiding officer may order, any party may serve upon an opposing party a written request for the admission of the genuineness and authenticity of any relevant documents described in and exhibited with the request, or for the admission of the truth of any relevant matters of fact stated in the request. Each of the matters of which an admission is requested shall be deemed admitted, unless within a period designated in the request (not less than 10 days after service thereof, or within such further time as the presiding officer or the reviewing authority if no presiding officer has yet been designated may allow upon motion and notice) the party to whom the request is directed serves upon the requesting party a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny such matters. Copies of requests for admission and answers thereto shall be served on all parties. Any admission made by a party to such request is only for the purposes of the pending proceeding, or any proceeding or action instituted for the enforcement of any order entered therein, and shall not constitute an admission by him for any other purpose or be used against him in any other proceeding or action.

§ 81.78 Evidence.

Irrelevant, immaterial, unreliable, and unduly repetitious evidence will be excluded.

§ 81.79 Cross-examination.

A witness may be cross-examined on any matter material to the proceeding without regard to the scope of his direct examination.

§ 81.80 Unsponsored written material.

Letters expressing views or urging action and other unsponsored written material regarding matters in issue in a hearing will be placed in the correspondence section of the docket of the proceeding. These data are not deemed part of the evidence or record in the hearing.

§ 81.81 Objections.

Objections to evidence shall be timely and briefly state the ground relied upon.

§ 81.82 Exceptions to rulings of presiding officer unnecessary.

Exceptions to rulings of the presiding officer are unnecessary. It is sufficient that a party, at the time the ruling of the presiding officer is sought, makes known the action which he desires the presiding officer to take, or his objection to an action taken, and his grounds therefor.

§ 81.83 Official notice.

Where official notice is taken or is to be taken of a material fact not appearing in the evidence of record, any party, on timely request, shall be afforded an opportunity to show the contrary.

§ 81.84 Public document items.

Whenever there is offered (in whole or in part) a public document, such as an official report, decision, opinion, or published scientific or economic statistical data issued by any of the executive departments (or their subdivisions), legislative agencies or committees, or administrative agencies of the Federal Government (including Government-owned corporations), or a similar document issued by a State or its agencies, and such document (or part thereof) has been shown by the offeror to be reasonably available to the public, such document need not be produced or marked for identification, but may be offered for official notice, as a public document item by specifying the document or relevant part thereof.

§ 81.85 Offer of proof.

An offer of proof made in connection with an objection taken to any ruling of the presiding officer rejecting or excluding proffered oral testimony shall consist of a statement of the substance of the evidence which counsel contends would be adduced by such testimony; and, if the excluded evidence consists of evidence in documentary or written form or of reference to documents or records, a copy of such evidence shall be marked for identification and shall accompany the record as the offer of proof.

§ 81.86 Appeals from ruling of presiding officer.

Rulings of the presiding officer may not be appealed to the reviewing authority prior to his consideration of the entire proceeding except with the consent of the presiding officer and where he certifies on the record or in writing that the allowance of an interlocutory appeal is clearly necessary to prevent exceptional delay, expense, or prejudice to any party, or substantial detriment to the public interest. If an appeal is allowed, any party may file a brief with the reviewing authority within such period as the presiding officer directs. No oral argument will be heard unless the reviewing authority directs otherwise. At any time prior to submission of the proceeding to it for decision, the reviewing authority may direct the presiding officer to certify any question or the entire record to it for decision. Where the entire record is so certified, the presiding officer shall recommend a decision.

Subpart I—The Record

§ 81.91 Official transcript.

The Department will designate the official reporter for all hearings. The official transcripts of testimony taken, together with any exhibits, briefs, or memoranda of law filed therewith shall be filed with the Department. Transcripts of testimony in hearings may be obtained from the official reporter by the parties and the public at rates not to exceed the maximum rates fixed by the contract between the Department and the reporter. Upon notice to all parties, the presiding officer may authorize corrections to the transcript which involve matters of substance.

§ 81.92 *Record for decision.*

The transcript of testimony, exhibits, and all papers and requests filed in the proceedings, except the correspondence section of the docket, including rulings and any recommended or initial decision shall constitute the exclusive record for decision.

Subpart J—Posthearing Procedures, Decisions

§ 81.101 Posthearing briefs: proposed findings and conclusions.

(a) The presiding officer shall fix the time for filing posthearing briefs, which may contain proposed findings of fact and conclusions of law, and, if permitted, reply briefs.

(b) Briefs should include a summary of the evidence relied upon together with references to exhibit numbers and pages of the transcript, with citations of the authorities relied upon.

§ 81.102 Decisions following hearing.

When the time for submission of posthearing briefs has expired, the presiding officer shall certify the entire record, including his recommended findings and proposed decision, to the responsible Department official; or if so authorized he shall make an initial decision. A copy of the recommended findings and proposed decision, or of the initial decision, shall be served upon all parties, and amici, if any.

§ 81.103 Exceptions to initial or recommended decisions.

Within 20 days after the mailing of an initial or recommended decision, any party may file exceptions to the decision, stating reasons therefor, with the reviewing authority. Any other party may file a response thereto within 30 days after the mailing of the decision. Upon the filing of such exceptions, the reviewing authority shall review the decision and issue its own decision thereon.

§ 81.104 Final decisions.

(a) Where the hearing is conducted by a hearing examiner who makes an initial decision, if no exceptions thereto are filed within the 20-day period specified in § 81.103, such decision shall become the final decision of the Department, and shall constitute "final agency action" within the meaning of 5 U.S.C. 704 (formerly section 10(c) of the Administrative Procedure Act), subject to the provisions of § 81.106.

(b) Where the hearing is conducted by a hearing examiner who makes a recommended decision, or upon the filing of exceptions to a hearing examiner's initial decision, the reviewing authority shall review the recommended or initial decision and shall issue its own decision thereon, which shall become the final decision of the Department, and shall constitute "final agency action" within the meaning of 5 U.S.C. 704 (formerly section 10(c) of the Administrative Procedure Act), subject to the provisions of § 81.106.

(c) All final decisions shall be promptly served on all parties, and amici, if any.

§ 81.105 Oral argument to the reviewing authority.

(a) If any party desires to argue a case orally on exceptions or replies to exceptions to an initial or recommended decision, he shall make such request in writing. The reviewing authority may grant or deny such requests in its discretion. If granted, it will serve notice of oral argument on all parties. The notice will set forth the order of presentation, the amount of time allotted, and the time and place for argument. The names of persons who will argue should be filed with the Department hearing clerk not later than 7 days before the date set for oral argument.

(b) The purpose of oral argument is to emphasize and clarify the written argument in the briefs. Reading at length from the brief or other texts is not favored. Participants should confine their arguments to points of controlling importance and to points upon which exceptions have been filed. Consolidations of appearances at oral argument by parties taking the same side will permit the parties' interests to be presented more effectively in the time allotted.

(c) Pamphlets, charts, and other written material may be presented at oral argument only if such material is limited to facts already in the record and is served on all parties and filed with the Department hearing clerk at least 7 days before the argument.

§ 81.106 Review by the Secretary.

Within 20 days after an initial decision becomes a final decision pursuant to § 81.104(a) or within 20 days of the mailing of a final decision referred to in § 81.104(b), as the case may be, a party may request the Secretary to review the final decision. The Secretary may grant or deny such request, in whole or in part, or serve notice of his intent to review the decision in whole or in part upon his own motion. If the Secretary grants the requested review, or if he serves notice of intent to review upon his own motion, each party to the decision shall have 20 days following notice of the Secretary's proposed action within which to file exceptions to the decision and supporting briefs and memoranda, or briefs and memoranda in support of the decision. Failure of a party to request review under this paragraph shall not be deemed a failure to exhaust administrative remedies for the purpose of obtaining judicial review.

§ 81.107 Service on amici curiae.

All briefs, exceptions, memoranda, requests, and decisions referred to in this subpart J shall be served upon amici curiae at the same times and in the same manner required for service on parties. Any written statements of position and trial briefs required of parties under § 81.71 shall be served on amici.

Subpart K—Judicial Standards of Practice

§ 81.111 Conduct.

Parties and their representatives are expected to conduct themselves with honor and dignity and observe judicial standards of practice and ethics in all proceedings. They should not indulge in offensive personalities, unseemly wrangling, or intemperate accusations or characterizations. A representative of any party whether or not a lawyer shall observe the traditional responsibilities of lawyers as officers of the court and use his best efforts to restrain his client from improprieties in connection with a proceeding.

§ 81.112 Improper conduct.

With respect to any proceeding it is improper for any interested person to attempt to sway the judgment of the reviewing authority by undertaking to bring pressure or influence to bear upon any officer having a responsibility for a decision in the proceeding, or his decisional staff. It is improper that such interested persons or any members of the Department's staff or the presiding officer give statements to communications media, by paid advertisement or otherwise, designed to influence the judgment of any officer having a responsibility for a decision in the proceeding, or his decisional staff. It is improper for any person to solicit communications to any such officer, or his decisional staff, other than proper communications by parties or amici curiae.

§ 81.113 Ex parte communications.

Only persons employed by or assigned to work with the reviewing authority who perform no investigative or prosecuting function in connection with a proceeding shall communicate ex parte with the reviewing authority, or the presiding officer, or any employee or person involved in the decisional process in such proceedings with respect to the merits of that or a factually related proceeding. The reviewing authority, the presiding officer, or any employee or person involved in the decisional process of a proceeding shall communicate ex parte with respect to the merits of that or a factually related proceeding only with persons employed by or assigned to work with them and who perform no investigative or prosecuting function in connection with the proceeding.

§ 81.114 Expeditious treatment.

Requests for expeditious treatment of matters pending before the responsible Department official or the presiding officer are deemed communications on the merits, and are improper except when forwarded from parties to a proceeding and served upon all other parties thereto. Such communications should be in the form of a motion.

§ 81.115 Matters not prohibited.

A request for information which merely inquires about the status of a proceeding without discussing issues or expressing points of view is not deemed an ex parte communication. Such requests should be directed to the Civil Rights hearing clerk. Communications with respect to minor procedural matters or inquiries or emergency requests for extensions of time are not deemed ex parte communications prohibited by § 81.113. Where feasible, however, such communications should be by letter with copies to all parties. Ex parte communications between a respondent and the responsible Department official or the Secretary with respect to securing such respondent's voluntary compliance with any requirement of Part 80 of this title are not prohibited.

§ 81.116 Filing of ex parte communications.

A prohibited communication in writing received by the Secretary, the reviewing authority, or by the presiding officer, shall be made public by placing it in the correspondence file of the docket in the case and will not be considered as part of the record for decision. If the prohibited communication is received orally, a memorandum setting forth its substance shall be made and filed in the correspondence section of the docket in the case. A person referred to in such memorandum may file a comment for inclusion in the docket if he considers the memorandum to be incorrect.

Subpart L—Posttermination Proceedings

§ 81.121 Posttermination proceedings.

(a) An applicant or recipient adversely affected by the order terminating, discontinuing, or refusing Federal financial assistance in consequence of proceedings pursuant to this title may request the responsible Department official for an order authorizing payment, or permitting resumption, of Federal financial assistance. Such request shall be in writing and shall affirmatively show that since entry of the order, it has brought its program or activity into compliance with the requirements of the Act, and with the Regulation thereunder, and shall set forth specifically, and in detail, the steps which it has taken to achieve such compliance. If the responsible Department official denies such request the applicant or recipient shall be given an expeditious hearing if it so requests in writing and specifies why it believes the responsible Department official to have been in error. The request for such a hearing shall be addressed to the responsible Department official and shall be made within 30 days after the applicant or recipient is informed that the responsible Department official has refused to authorize payment or permit resumption of Federal financial assistance.

(b) In the event that a hearing shall be requested pursuant to subparagraph (a) of this section, the hearing procedure established by this part shall be applicable to the proceedings, except as otherwise provided in this section.

Subpart M—Definitions

§ 81.131 Definitions.

The definitions contained in § 80.13 of this subtitle apply to this part, unless the context otherwise requires, and the term "reviewing authority" as used herein includes the Secretary of Health, Education, and Welfare, with respect to action by that official under § 81.106.

Transition provisions: (a) The amendments herein shall become effective upon publication in the FEDERAL REGISTER.

(b) These rules shall apply to any proceeding or part thereof to which Part 80 of this title as amended effective October 19, 1967 (published in the FEDERAL REGISTER for Oct. 19, 1967), and as the same may be hereafter amended, applies. In the case of any proceeding or part thereof governed by the provisions of Part 80 as that part existed prior to such amendment, the rules in this Part 81 shall apply as if these amendments were not in effect.

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APPENDIX A

TEXT OF THE REGULATIONS
IMPLEMENTING SECTION 504
OF THE REHABILITATION ACT OF 1973

APPENDIX B

DESCRIPTION OF EIGHT INSTITUTIONS INTERVIEWED
FOR STUDY OF FEDERAL 504 HANDICAPPED ACCESS REGULATIONS

University A: A medium-sized, private, urban research university with an enrollment of 21,000 students. This is an "inexperienced" institution having had only an occasional handicapped student or employee before the 504 regulations.

University B: A medium-sized, private, urban university with a student body of 20,000 fte's -- 6,000 on the main campus. This is an "experienced" institution, with over 100 handicapped students and a handful of handicapped employees each year. University B has had a full-time Disabled Student Services Coordinator since 1975.

State University A: The study was confined to the main campus, which has 34,000 students, of whom over 400 are disabled. There are over a hundred handicapped employees. The Disabled Student Services Office is more than ten years old.

State University B: A large, "experienced" institution, with 41,000 students on a central campus. There are about 300 - 400 handicapped students and the Disabled Student Services Office dates from 1973.

College A: A small, "inexperienced", private, rural liberal arts college with 1,100 students.

College B: A small, "experienced", private, rural liberal arts college, with 600 students. It was founded in the early 1960s as an accessible institution with special accommodations for those with severe orthopedic disabilities. It has had a Disabled Student Services Office for most of its existence. There are about 35 handicapped students each year with roughly a dozen served by orthopedic care. There are a few handicapped employees.

College C: A very small, "inexperienced", rural liberal arts college with an enrollment of 500 students.

The Community College: A large, "experienced", multi-campus institution with a total enrollment of 56,000 students, about 185 of them disabled. There are over 1,000 handicapped employees requiring some kind of job accommodation. The campus visited was built in the early 1960s and is large accessible to the handicapped.

N.B. Numbers of handicapped students and employees are estimates only. Such counts are based on two factors: information volunteered to the institution by handicapped individuals, and number of persons recorded as needing some form of accommodation.

APPENDIX C

STUDY OF FEDERAL HANDICAPPED-ACCESS REGULATIONS UNDER SECTION 504, REHABILITATION ACT OF 1973

Questionnaire Utilized in Institutional Interviews

I. Before the Issuance of the Regulations

What was your institution's situation:

(A) Did you have any handicapped students or employees?

(B) Were you aware of federal laws or federal agency actions re higher education access for the handicapped?

II. During Promulgation of the Regulations

What part, if any, did your institution have in the formulation of the 504 regulations, either individually or through organizations?

III. Since the Final Regulations Were Issued

A. From what source did you get information on the regulations and on their implications for your institution — own personnel (counsel, Washington rep, others)? federal government? higher education associations? others?

B. What is the effect of the 504 regulations on your institution?

1. Policy changes:

What are they and how were they made?

2. Procedural changes; policy implementation:

a. What kind of mechanism has been set up to achieve (and assure continuing) compliance?

b. What physical changes are being/will be made? What are the costs: actual? estimated?

c. What changes in procedures are necessary?

d. How has deployment of personnel changed?

3. Financial implications (present and continuing; for structural and other changes):

a. What are the financial costs (actual; estimated)?

b. Sources of these funds:

— for structural changes?

— for other changes?

4. How long do you think it will actually take for your institution to achieve compliance?

IV. In your opinion, how successful/productive are the regulations and procedures that have been set up by the federal government for 504?

A. In what respects are they successful and productive? unsuccessful and unproductive?

B. In what ways could the regulations and procedures be improved?

C. How much assistance, if any, have you had from federal personnel?

D. What are your institution's problems in implementing the regulations? (This includes the question of attitudinal barriers.)

E. If your institution has problems with the 504 regulations, how are they tacklud and resolved? If contact with the government re these problems — by what process? was it effective?

APPENDIX D

STUDY OF FEDERAL HANDICAPPED-ACCESS REGULATIONS UNDER SECTION 504, REHABILITATION ACT OF 1973

Questionnaire Utilized in HEW/OCR Interviews

I. Before the Issuance of the Regulations

A. What were the forces and pressures that led to the drafting of the regulations?

B. What was the perception of the regulations-drafters as to Congress's purposes in enacting Section 504?

C. What was the concept of the regulations-drafters as to OCR's 504 activities in relationship to the activities of other federal agencies dealing with the handicapped?

II. During Promulgation of the Regulations

-- What were the steps in translating Congressional purpose into detailed regulation?

III. Since the Final Regulations Were Issued

A. Information and Technical Assistance:

-- What is available to higher education institutions?

-- What use have they made of it?

B. Response of Higher Education Institutions to the 504 Regulations:

1. What has it been in general?
2. What has it been re specific issues?

IV. In your opinion, how successful/productive are the regulations and procedures set up by OCR for 504?

In general, and re specific required procedures:

A. In what respects are they successful and productive? unsuccessful and unproductive?

B. In what ways could the regulations and procedures be improved?

C. How much assistance has the federal government given to colleges and universities?

D. Institutions' problems in implementing the regulations:

1. What kinds of problems?

2. What parts of the regulations do you feel are the most difficult for the institutions, and what can be done to make them less so?

E. Ways in which the institutions tackle and resolve these problems:

Institutional contacts with the government: are they effective?

F. Do you have any indications of benefits to institutions from the 504 regulations?

V. Compliance and enforcement:

A. What are the policies and procedures? How are they communicated to the institutions?

B. What enforcement actions have been taken? are planned?

APPENDIX E

COMPLIANCE DEADLINES FOR 504 REGULATIONS

Requirement	Deadline
(1) Appointment of 504 Coordinator	June 3, 1977 (effective date of 504 Regs)
(2) Adoption of grievance procedures	June 3, 1977
(3) Submission to HEW of Assurance-of-Compliance Form	July 5, 1977
(4) Attainment of program accessibility (except for needed structural modifications)	August 2, 1977
(5) Notification of non-discrimination policy to employees and beneficiaries	September 2, 1977
(6) Completion of Transition Plan (for accomplishing structural modifications)	December 2, 1977
(7) Completion of Self-Evaluation	June 3, 1978
(8) Completion of needed structural modifications	June 3, 1980